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**P.O. 444**  
**20 Harrison St.**  
**Waldwick, N.J. 07463,**  
**201-444-5990**  
**Fax 201-444-5094**

January 31, 2006

The Honorable Vernon A. Williams  
Secretary, Surface Transportation Board  
Mercury Building, Room 700  
1925 K Street, N.W.  
Washington, D.C. 20423

**FEE RECEIVED**

FEB 1 2005

**SURFACE  
TRANSPORTATION BOARD**

Re: Transit Solution Group, LLC Notice of Exemption, Passenger  
Rail Service on Tracks of the Nashville and Eastern Railroad  
between Nashville, Tennessee and Labanon Tennessee  
FD 34832

Dear Sir:

Enclosed please find the original and ten copies of the Notice of Exemption,  
Caption Summary and exhibits related to the captioned notice. Also enclosed please find  
our check in the amount of \$1,500 for the filing fee and a disk containing the materials in  
Microsoft Word.

Thank you for your attention to this matter.

Very truly yours,

John F. McHugh

**ENTERED**  
**Office of Proceedings**

FEB 1 2006

**Part of**  
**Public Record**

**FILED**

FEB 1 2005

**SURFACE  
TRANSPORTATION BOARD**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 34832

**FEE RECEIVED**

**TRANSIT SOLUTIONS GROUP, LLC**

FEB 1 2005

**-NOTICE OF EXEMPTION-**

**SURFACE  
TRANSPORTATION BOARD**

**PASSENGER RAIL SERVICE ON TRACKS OF THE NASHVILLE AND  
EASTERN RAILROAD BETWEEN NASHVILLE, TENNESSEE AND  
LEBANON, TENNESSEE**

a. Transit Solutions Group, LLC, a non carrier, hereby files this notice of exemption pursuant to 49 CFR 1150.31 to commence the operation of common carrier passenger rail service on tracks owned by the Nashville & Eastern Railroad between Nashville, Tennessee and Lebanon, Tennessee a distance of 32 miles. The franchise sought here is to operate common carrier rail passenger services as directed by the The Regional Transportation Authority, a public body created under authority of T.C.A. § 64-8-101, et seq. (RTA) (an entity created by the Tennessee General Assembly for the purpose of planning for and implementing transit services within its member jurisdictions) and only as so directed.

b. Transit Solutions Group, LLC is represented by:

John F. McHugh, Esq.  
6 Water Street  
New York, N.Y. 10004  
212-483-0875

**ENTERED  
Office of Proceedings**

**FEB 1 2005**

**Part of  
Public Record**

**FILED**

FEB 1 2005

**SURFACE  
TRANSPORTATION BOARD**

c. Transit Solutions Group, LLC (TSG) has an agreement with the RTA Exhibit A, which has an agreement with the Nashville & Eastern Railroad (N&E) and the Nashville & Eastern Railroad Authority (NERA), Exhibit B (the N&E Agreement). Pursuant to the N&E Agreement, the RTA by its agent, TSG, is authorized to operate passenger rail services between downtown Nashville, Tennessee MP 0 and Lebanon, Tennessee MP 32. The service is to be limited to passenger services as demanded of TSG by RTA and service may be terminated by RTA should funding for the service not be continued by the State of Tennessee.

d. The name of the rail service operator will be Transit Solutions Group, LLC. The operation will be over trackage rights granted to the RTA in the N&E Agreement.

e. TSG will be a common carrier to the public whose demands for service will be made by the RTA.

1. No prior carrier has provided common carrier passenger service on this line since such service was abandoned by the Tennessee Central Railroad. The address of the N&E which operates freight service on the line is P.O. Box 795, 5138 Main St., Battenshire Bldg., Manchester, VT. 05255.

2. The operation contemplated here will commence no sooner than Summer of 2006.

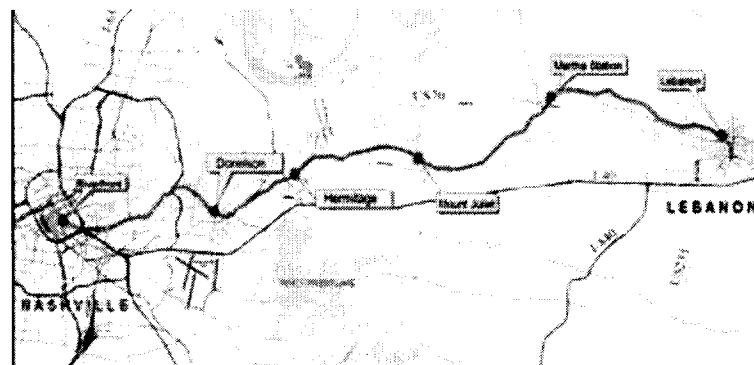
3. The line to be operated lies entirely within the State of Tennessee. The MP designations are 0 in downtown Nashville. The service will extend eastward through Donelson, MP 7.8, Stone River, MP 9.9, Hermitage, MP 10.6, Green Hill, MP 15.0, Mt. Juliet, MP 17.0,

Beckwith, MP 20.9, Martha, MP 23.4 and Lebanon, MP 32.0. Stations will be located at Riverfront-Nashville, Donelson, Hermitage, Mt. Juliet, Martha and Lebanon.

4. Total miles operated is to be 32.

f. The route serves the counties of Davidson MP 0-13.75 and Wilson MP 13.75-32.

The map depicts STG service



g. Applicant certifies that its projected revenues will not exceed those which would qualify it as a Class III carrier.

5. This operation will not displace any railroad employees. Thus, no labor protection is required.

6. No adverse environmental effect will result from this transaction. The RTA has the right to operate these services under the laws of the State of Tennessee. This transaction seeks authority only to operate service already approved authorized under State Law after a full environmental review. TSG's obtaining authority to operate over tracks owned by N&ERA and operated by N&E for freight services will have no adverse environmental effect. The RTA commuter service project Environmental Assessment resulted in a Finding of No Significant Impact issued on April 10, 2000. A

Supplemental Environmental Assessment was completed and a finding of No Significant Impact was issued in April of 2005.

Dated, New York, N.Y.  
January 27, 2006

Respectfully Submitted,



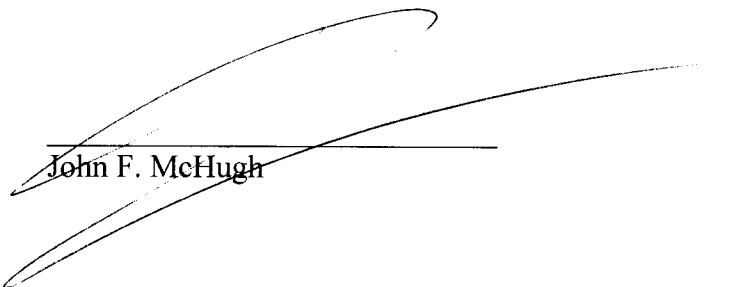
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John F. McHugh  
6 Water Street  
New York, N.Y. 10004  
212-483-0875

#### VERIFICATION

John F. McHugh, verifies under penalty of perjury that he is the duly appointed representative of Transit Solutions Group, LLC and has reviewed the information set forth in this Notice of Exemption and has compared it with the documents provided by the client and knows that the information herein accurately describes the operation and financial results contemplated by applicant as set forth in those documents to the best of his knowledge and belief.

Dated, January 27, 2006



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John F. McHugh

# **SURFACE TRANSPORTATION BOARD**

## **NOTICE OF EXEMPTION**

FINANCE DOCKET NO. \_\_\_\_\_

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### **TRANSIT SOLUTIONS GROUP**

#### **-NOTICE OF EXEMPTION-**

#### **PASSENGER RAIL SERVICE ON TRACKS OF THE NASHVILLE AND EASTERN RAILROAD BETWEEN NASHVILLE TENNESSEE AND LEBANON TENNESSEE**

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#### **Caption Summary**

Transit Solutions Group has filed a notice of exemption, pursuant to 49 CFR 1150.31 to commence passenger service as a class III rail common carrier over trackage rights granted to the Regional Transit Authority by the Nashville and Eastern Railroad and the Nashville and Eastern Railroad Authority. The service will extend from MP 0 at Riverfront Park in downtown Nashville, Tennessee through Donelson, MP 7.8, Stone River, MP 9.9, Hermitage, MP 10.6, Green Hill, MP 15.0 Mt. Juliet, MP 17.0, Beckwith, MP 20.9, Martha, MP 23.4 and Lebanon, MP 32.0. Passenger stations at Riverfront-Nashville, Donelson, Hermitage, Mt. Juliet, Martha and Lebanon, Tennessee, in Davidson and Wilson Counties will be served by the contemplated passenger services. Petitioner's representative is John F. McHugh, 6 Water Street, New York, N.Y. 10004, 212-483-0875. Petitioner is under common control with the Nashville and Eastern

Railroad and the Nashville and Western Railroad, neither of which provide passenger services on their lines.

Dated, New York, N.Y.  
January 27, 2006

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John F. McHugh  
6 Water Street  
New York, N.Y. 10004  
212-483-0875

# EXHIBIT A

**MEMORANDUM OF AGREEMENT  
BY AND BETWEEN  
THE REGIONAL TRANSPORTATION AUTHORITY  
AND  
THE NASHVILLE AND EASTERN RAILROAD AUTHORITY  
AND  
THE NASHVILLE AND EASTERN RAILROAD CORPORATION**

This MEMORANDUM OF AGREEMENT is entered into this \_\_\_\_ day of \_\_\_\_\_ 2003, by and between The Regional Transportation Authority, a public body created under authority of T.C.A. § 64-8-101, et seq. (RTA); The Nashville and Eastern Railroad Authority, a public body created under authority of T.C.A. § 37-56-201, et seq. (NERA); and The Nashville and Eastern Railroad Corporation, a corporation duly chartered by the State of Tennessee (NERC).

WHEREAS, RTA is authorized by T.C.A. § 64-8-104 to devise a plan(s) for public transportation services in the counties and cities from which it is comprised; and,

WHEREAS, RTA also has the authority under T.C.A. § 64-8-104 to enter into contracts for the purpose of operating public transportation services; and,

**WHEREAS, NERA has the authority to own, build upon, condemn property for public use, purchase the rights-of-way, and operate a railroad for freight and / or commuter service; and**

WHEREAS, NERA owns the railroad line that connects Lebanon, Tennessee to Nashville, Tennessee; and,

WHEREAS, the Nashville and Eastern Railroad is on the rail lines in a commuter rail network being planned by RTA; and

**WHEREAS, NERC, through its operating agreement with NERA, is the railroad company that provides service on the railroad line between Lebanon and Nashville and has rights and contractual obligations to NERA through their operating agreement; and,**

WHEREAS, RTA has included the railroad that links Lebanon and Nashville as a route for implementation of commuter rail services; and,

WHEREAS, subject to the terms and conditions stated in this Agreement, NERA and NERC agree to allow RTA and its contractors to have access to NERA's railroad between Lebanon and Nashville for the sole purpose of providing commuter rail service.

NOW, THEREFORE, for good and valuable consideration as stated herein below, the parties hereto agree to the following terms and conditions:

## SECTION 1. DEFINITIONS

- A. "AREMA" means the American Railroad Engineering and Maintenance Association.
- B. "Commuter Rail Service" means the transportation or conveyance of persons by rail between Lebanon and Nashville, Tennessee and points in between, including groups of the general public with special needs, in accordance with schedules and train consists established by agreement between the parties to this Agreement, as such schedules and consists may be modified by the Service Plan or otherwise as provided for under this Agreement, and the transportation of Rolling Stock to and from maintenance and appurtenant facilities as provided for in this Agreement or otherwise as necessary for the provision of passenger rail services under this Agreement. Commuter Rail Service shall not include (i) Freight Service, (ii) intercity passenger operations, or (iii) special event or excursion passenger trains sanctioned by NERC that operate outside the Service Plan.
- C. "Capital Improvements" means any improvement, replacement, rebuilding and rehabilitation of the rights of way for the Subject Line, track, grade crossings, bridges, drainage structures, signal and communication systems on the Subject Line necessary for the provision of Commuter Rail Service, but excluding regular maintenance thereof.
- D. "Car Mile" means the number of cars in a train consist multiplied by the number of miles traveled yields the number of car miles per train. A locomotive shall count as two cars.
- E. **"Construction Status Report" shall include accomplishments of work in progress by material, quantity and location.**
- F. "CPI Index" shall mean the Consumer Price Index promulgated by the Federal Government **Department of Labor, Bureau of Labor Statistics, All Urban Consumers, Southern Region, For All Items, Not Seasonally Adjusted**. For the purposes of this Agreement, the beginning index shall be the January, 2003 index which is 175.1.
- G. "Freight Service" or "Rail Freight Service" means the transportation of goods by rail as provided by NERC on the Subject Line by authority of the Operating Agreement between NERC and NERA.
- H. "Letter of Agreement" shall mean the Letter of Agreement dated December 30, 1999 between RTA and NERC regarding Commuter Rail Service on the Subject Line.
- I. "NERA Property" means the trackage, associated real property and rights-of-way including bridges, drainage structures, track and structures and other appurtenances of the Subject Line and any Capital Improvements added to the Subject Line.
- J. "NERC Property" means all locomotives and other Rolling Stock, maintenance of way tools, equipment, other material and vehicles used by NERC in its operations on the Subject Line.

- K. "Operating Agreement" means the Operating Agreement between NERA and NERC dated January 19, 1995 as may be amended for exclusive trackage rights allowing NERC to provide rail service on all lands conveyed to NERA by CSX Transportation, Inc. on August 15, 1986 and identified therein as the "N&E Branch".
- L. "Operating Rules" shall mean the rules and procedures, including qualification of members of train crews, adopted and promulgated by NERC for operation of trains on the Subject Line.
- M. "Operator" shall mean any person, company or corporation, selected by RTA to operate Commuter Rail Service on the Subject Line.
- N. "Rolling Stock" means locomotives, passenger coaches, and cab cars used to provide Commuter Rail Service.
- O. "Rolling Stock Maintenance Provider" means either NERC or a third-party contractor, under contract with RTA to maintain all Rolling Stock in a condition fit for use for Commuter Rail Service.
- P. "Service Plan" means the schedules and consists for Commuter Rail Service during a calendar year in accordance with the provisions of this Agreement.
- Q. "Subject Line" means the portion of the railroad line owned by NERA and operated by NERC under the Operating Agreement beginning at approximately milepost (MP) 0.4 in Nashville, Tennessee and extending to MP 32 in Lebanon, Tennessee but specifically excluding the following:
- (1) All industrial lead tracks;
  - (2) The sidings from MP 0.5 to 0.9 used for storage;
  - (3) All Southern Junction Yard tracks;
  - (4) The mainline from MP 1.0 to Approximately 2.4 through Southern Junction Yard;
  - (5) Wye tracks;
  - (6) Stones River Yard tracks, except for the mainline;
  - (7) Mount Juliet siding between Industrial Blvd. And Clemmons Road;
  - (8) Martha siding on the South side of the mainline;
  - (9) Siding at MP 31.5; and,
  - (10) Any other trackage constructed by or for NERA or NERC or its customers.
- R. "Special Event Trains" shall have the meaning set forth in Section 11 of this Agreement.
- S. "Train" shall mean one or more locomotives or other self-propelled rail units with or without freight, commuter or passenger cars attached thereto.

- T. "Train Miles" shall mean the sum of the number of miles traveled on the Subject Line for Commuter Rail Service, whether or not revenue-generating, inclusive of all locomotives or self-propelled rail units and attached freight, commuter or passenger cars and excluding locomotive-only moves, work trains when they perform work on the Subject Line, and hi-rail vehicles.
- U. "Train Moves" shall mean the movement of any train. This includes a light locomotive move or other train move whether or not it is carrying passengers or freight.

## **SECTION 2. GRANT / ASSIGNMENT OF OPERATING RIGHTS FOR COMMUTER RAIL SERVICE**

### **2.01 Grant & Assignment.**

NERC hereby assigns to RTA its exclusive right to provide Commuter Rail Service on the Subject Line as granted to it by NERA under Section 3.1 of the Operating Agreement. NERA hereby approves of this assignment and, likewise grants to RTA the exclusive right to operate Commuter Rail Service on the Subject Line. The parties may agree **in writing** to the use of any additional trackage necessary for the efficient operation of Commuter Rail Service. The rights granted and/or assigned herein are subject to the terms and conditions of this Agreement. The rights granted and/or assigned herein on the Subject Line shall include the following, as further provided herein: (i) construction of Capital Improvements required to upgrade the Subject Line to allow it to sustain a marketable Commuter Rail Service, (ii) Construction, operation and maintenance of stations for Commuter Rail Service, (iii) operation of passenger trains for commuter Rail Service, (iv) maintenance of Rolling Stock used in Commuter Rail Service.

### **2.02 Term.**

The term of this Agreement and the rights and obligations herein stated shall extend **through and including September 15, 2036. Should the Operating Agreement between NERA and NERC be extended, then the term of this Agreement shall be in effect until the expiration date of the NERA and NERC agreement.**

### **2.03. Cost.**

Except as specifically stated in this Agreement, all cost of and expenses incurred as a result of Commuter Rail Service, including Capital Improvements as determined necessary by RTA, **NERC and NERA** for the efficient provision of Commuter Rail Service, shall be borne by RTA. **Any dispute as to the necessary improvements will be resolved under the provisions of Section 9.**

#### 2.04. Operator.

RTA shall provide Commuter Rail Service through contract with either NERC or an Operator. RTA shall procure the Operator through a competitive procurement process in compliance with all applicable statutes, regulations and procurement procedures required by the Federal Transit Administration (FTA) and the Tennessee Department of Transportation (TDOT) and Tennessee laws regarding procurements by local governments. NERC may participate in the procurement process by submitting a bid or proposal to provide Commuter Rail Service. RTA shall assure that the procurement documents and any resulting contract with an Operator shall be consistent with and observe the terms and conditions of this Agreement and not interfere with NERC's rights under the Operating Agreement.

In the event that NERC is not the operator, NERC and NERA shall have the right to approve the Operator prior to commencing Commuter Rail Service, which approval shall not be unreasonably withheld, **so long as the proposed Operator has demonstrated to all parties that it has the experience and financial capability to provide the proposed Commuter Operation.** It shall be unreasonable for NERC and NERA to withhold approval for any purpose, reason or objective that is inconsistent with Federal, State or local competitive procurement laws and regulations applicable to RTA or which would place at risk continued funding by the FTA and/or the State of Tennessee.

#### 2.05. Operations.

RTA acknowledges that the primary reason for the creation of the NERA was to continue and expand rail freight service to the communities on the Subject Line and the remainder of the railroad conveyed to NERA by CSX Transportation on August 15, 1986. RTA further acknowledges that the Operating Agreement is the means by which NERA chooses to provide rail services and management of its property and the obligations imposed on NERC to provide those services. To those ends, RTA binds itself that to the extent reasonably possible, to assure that Commuter Rail Service on the Subject line will not have a material adverse impact on those services provided by NERC.

#### 2.06. Inspection.

RTA and **NERA or their agents and consultants, at their respective costs, may,** upon reasonable notice and in compliance with NERC's rules and regulations inspect at any time the Subject Line and any aspect of Commuter Rail Service; provided, however, that such inspection shall not unreasonably hinder or delay Commuter Rail Service, NERC's Freight Service, or any other rail operation on the Subject Line. NERC and NERA shall permit RTA, its employees, agents, and consultants access to the Subject Line for any purpose related to this Agreement and Commuter Rail Service; provided, however, that in advance of entering the Subject Line such persons must be insured, **and provide proof of insurance coverage, and**

**such persons shall** execute any release or other entry documents, and comply with the provisions of Section 5.06 of this Agreement. The insurance to be required is intended to cover railroad protective liability and other risks, naming NERC, NERA, RTA and any other entity operating rail service on the Subject Line as named insureds. The right of access granted by this Section 2.06 shall not be construed to include any right to modify the Subject Line.

## **SECTION 3. CAPITAL IMPROVEMENTS**

### **3.01. Initial Upgrade, Capital Improvement Plan**

RTA shall bear the exclusive responsibility and cost to upgrade the Subject Line to an adequate standard prior to commencing Commuter Rail Service. The standard for the total improvement shall be not less than the Class III standard as promulgated in 49 C.F.R. Part 213 as the same may be amended or re-codified by the Federal Railroad Administration (FRA). With respect to the Class III standard, it is agreed between the parties that the ties, track and track bed **shall** be upgraded to a higher level of reliable operation. However, nothing herein shall obligate RTA to upgrade the Subject Line to a Class IV standard. RTA shall be responsible for the preparation of a plan for the initial Capital Improvements to upgrade the Subject Line (Initial Capital Improvement Plan). The parties shall, by agreement, provide that the Final Design for the commuter rail project will constitute the Initial Capital Improvement Plan. At its discretion the RTA may employ the services of one or more contractors to prepare the Initial Capital Improvement Plan. RTA shall assure that NERA and NERC **shall** be allowed to provide input in the preparation of the Initial Capital Improvement Plan at the initial concept stage and at the 60%, 90% and final design review stages. NERC and NERA will have **20 working days** to provide comments after RTA provides material for their review. The design standards specifications for the Initial Capital Improvement Plan shall be consistent with **the NERC standards and AREMA guidelines as applicable**. RTA shall provide NERA and NERC with the final draft of the Initial Capital Improvement Plan for their comment and approval, which approval shall not be unreasonably withheld.

### **3.02. Content of the Initial Capital Improvement Plan.**

The Initial Capital Improvement Plan shall describe in detail the design of all recommended Capital Improvements. Such Capital Improvements may include the realignment of portions of the Subject Line to allow for upgrade to not less than the FRA Class III standard. The Initial Capital Improvement Plan shall specify all necessary improvements to the roadbed and track including any passing track(s) and siding(s) necessary to provide **two (2) way** Commuter Rail Service without interference with current NERC operations. The Initial Capital Improvement Plan shall specify improvements or replacements of any bridges and highway grade crossings necessary or recommended for Commuter Rail Service. The Initial Capital Improvement Plan shall provide itemized cost estimates for each of its recommended Capital Improvements.

### 3.03. Commuter Stations.

The Initial Capital Improvement Plan shall include recommendations for the location and design of all commuter rail passenger stations on the Subject Line. RTA shall consult with NERA and NERC on the placement and design of commuter rail passenger stations. The design shall include adequate parking facilities for passengers and employees. The Initial Capital Improvement Plan shall specify any necessary real property acquisitions for construction of commuter rail stations. NERA shall acquire all real property not previously acquired for commuter rail passenger stations through its power of eminent domain. RTA shall provide all funding for such real property acquisition and all associated costs, **including but not limited to attorney's fees, advance payment of property acquisition funds, litigation expenses and acquisition costs and shall pay NERA for said costs.** Upon completion of the acquisition of any real property for commuter rail passenger stations, NERA shall lease the same property to RTA for its sole use as a commuter rail passenger station for One Dollar (\$1.00) per year and for a term that is equal to the then remaining term of this Agreement. Any development revenue realized on NERA/NERC right of way, **or real property** shall be allocated solely to the Subject Line. **For property owned by RTA,** RTA shall have the right to assign development rights for commuter rail passenger stations and any revenue realized thereby shall be allocated to the commuter rail corridors as determined by RTA.

### 3.04. Construction of Capital Improvements/Initial Upgrade.

RTA shall procure the services of one or more contractors for the construction of the Initial Capital Improvements/Upgrade. RTA shall procure construction and construction management services in a manner that is fully compliant with all Federal requirements, including, but not limited to 49 U.S.C. 5325, 40 U.S.C. 541, 49 C.F.R. 18.36 and FTA Circular 422o.1.D, as well as all applicable requirements of the State of Tennessee. NERC may, at its option, seek to provide such services by submitting proposals or bid in any competitive procurement process conducted by RTA for the Initial Capital Improvements/Upgrade.

### 3.05. Contractors Obligations to NERA and NERC.

In the event any contractor for construction or construction management services is an entity other than NERC, RTA shall by contract require any such contractor to indemnify and hold harmless NERC and NERA from liability for any personal injury, death, property damage, assessments, losses of whatever nature, damages, costs and expenses, including without limitation, interest, penalties and attorneys' fees and other costs of litigation arising out of the work performed under the contract by the contractor, its officers, employees and/or agents including any sub**contractors** or independent contractors, whether any such acts or omissions are direct, consequential, indirect, incidental or otherwise arising out of or otherwise in connection with the work performed under the contract. RTA shall also by contract require any such

contractor to indemnify and hold harmless NERC and NERA from any claim, damages, costs and attorneys' fees arising from any failure of such contractor, its officers, employees and/or agents, including its sub**contractors** or independent contractors, to observe applicable laws, including, but not limited to, labor laws, safety laws, **workers compensation laws** and minimum wage laws.

NERC and NERA shall have the right to approve contract provisions and any such contractor prior to its commencing work on the Subject Line which approval shall not be unreasonably withheld. It shall be unreasonable for NERC and NERA to withhold approval for any purpose, reason or objective that is inconsistent with Federal, State or local competitive procurement laws and regulations applicable to RTA, or which would place at risk continued funding by the FTA and/or the State of Tennessee. Any such contractor shall comply with all insurance requirements and operating rules and procedures of NERC.

**Furthermore, any contractor performing work on the Subject Line shall have a valid Tennessee Contractor's License for the required work. In addition, all construction contractors shall require that the contractor or its subcontractors or independent contractors shall not leave scrap material resulting from the project work on the NERA rights-of-way, and said scrap material shall be promptly secured and removed as part of the project.**

NERC shall have full control and final determination of track availability for construction or rehabilitation on the Subject Line and shall provide reasonable and timely access to contractors. NERC shall be the designator of the area(s) to be used by contractors for storage of materials and equipment during construction or rehabilitation within NERA's right-of-way. NERC shall have the right to inspect and approve **all** work before it is put into active service. Flagging protection will be provided by NERC when reasonably required. Such approval shall not be unreasonably withheld.

### **3.06. Observance of Safety Rules and Laws.**

In the event any contractor for construction and construction management services for the Initial Capital Improvements/Upgrades is an entity other than NERC, RTA shall by contract require any such contractor and its subcontractors to observe and comply with all applicable safety rules and procedures adopted by NERC for operation on the Subject Line. RTA shall also by contract require any such contractor to comply with any and all laws, regulations and rules including, without limitation, those pertaining to employee health and safety and environmental matters, adopted promulgated and/or enforced by any agency with competent jurisdiction of the United States, the State of Tennessee and any political subdivision thereof.

### **3.07. Noninterference with Freight Service.**

In the event any contractor for construction and/or construction management for the Initial Capital Improvements/Upgrade is an entity other than NERC, RTA shall by contract require any such contractor and all subcontractors to take any and all reasonable action to minimize interference with NERC's Freight Service in accordance with the project schedules and in accordance with the contract's terms, which shall include liquidated damages clauses to the benefit of NERC.

**If the contractor defaults, and the bond holder does not perform within 10 working days, NERC has the right to cure by restoring the Subject Line to operable conditions for normal railroad operations, and bill the RTA for such costs.**

### **3.08. Use of Released Materials.**

Materials released as a result of the Initial Capital Improvements/Upgrade including, without limitation rails, bridge materials and highway crossing material will be made available for reuse by NERA. The Subject Line will be the first priority for any reuse. All released material that is retained by NERA will be stockpiled at locations along the Subject Line deemed suitable by NERC. All such material will be graded and inventoried by NERC on behalf of NERA. If the material is not slated for immediate use on the Subject Line, then NERA may use the material elsewhere on its property as it sees fit. If NERA sells any such material, NERA will invest the proceeds from the sale on the Subject Line. NERA and NERC shall comply with their obligations to TDOT concerning reuse or disposal of any released material. NERA may designate certain released materials with de minimus value to remain the property of RTA. Material released as the result of projects between MP 5.0 and M.P 6.0 and between MP 22.0 and MP 24.6 are not subject to the above provisions because they are subject to separate agreements.

Any material that was placed on the Subject Line through the use of Federal funds that is released as a result of subsequent capital improvements shall be re-used on the Subject Line or disposed of in accordance with the provisions of 49 C.F.R. 18.32 and any amendment thereto or re-codification thereof.

**All released materials shall be handled in such a manner as to leave no surplus material on or along the NERA right-of-way.**

### **309. Construction Status Report.**

**RTA, NERA, and NERC shall provide and be provided monthly status reports of all construction improvements performed within the right-of-way covered under this agreement.**

## **SECTION 4. MAINTENANCE-OF-WAY/CAPITAL REPLACEMENT**

### **4.01. Responsibility for Maintenance-of -Way.**

NERC shall be responsible for performing all MOW on the Subject Line. After the completion of the Initial Capital Improvements/Upgrade and subsequent Capital Replacements as performed from time to time, NERC shall maintain the Subject Line to FRA Class III standard as defined in 49 C.F.R. Part 213 as the same may be amended or re-codified. For purposes of this Agreement the term "Maintenance-of-Way" (MOW) shall include all maintenance and repair of the track, roadbed and signals of the Subject Line, but excluding all Capital Improvements as defined in Section 1.B. of this Agreement and capital replacements as that term is defined in this Section 4, necessary to maintain the Subject line at FRA Class III standard.

### **4.02. Failure to Maintain.**

In the event that NERC has failed to comply with its duty to perform MOW, RTA shall have the right to provide written notice to NERC specifically describing such failure. Should NERC fail to cure the failing condition within thirty (30) days of such written notice, RTA shall have the right to either (i) cause the condition to be cured and bill NERC its reasonable costs to cure, or (ii) to contract with a third party for Maintenance-of-Way of the Subject Line, and reduce the compensation paid to NERC by the reasonable cost of such contract for Maintenance-of-Way. In the event that RTA reasonably concludes that any condition correctible by MOW will interrupt Commuter Rail Service, NERC shall, upon notice, correct said condition as soon as reasonably possible and the thirty-day period to cure defects stated above, shall not be applicable.

### **4.03. Notice of Maintenance.**

To the extent reasonably possible, NERC shall perform MOW at times that will not interfere with Commuter Rail Service. In order to allow RTA and/or the Operator to plan for possible delays in service, NERC shall provide RTA with advance notice of any MOW work it plans to perform on the Subject Line that is reasonably likely to affect Commuter Rail Service. Notice shall be provided at the earliest possible time and be provided in writing if reasonably possible. NERC shall follow up any oral notice with written notice. In the event that NERC is not the operator or the Commuter Rail Service, it shall provide notice of MOW work to the Operator concurrently with its notice to RTA.

### **4.04. Slow Orders.**

NERC shall have the sole authority to impose slow orders affecting Commuter Rail Service on the Subject Line as may be necessary from time to time due to MOW or

**Capital Improvements.** In order to allow RTA and/or the Operator to plan for possible delays in service, NERC shall provide RTA with immediate notice of any such slow order, if such work could reasonably affect commuter rail service. NERC shall follow up any oral notice with written notice. In the event that NERC is not the operator of the Commuter Rail Service, it shall provide notice of slow orders to the Operator concurrently with its notice to RTA.

#### **4.05. Ongoing Maintenance/Capital Replacements.**

NERC's obligation to perform ongoing maintenance after the Initial Capital Improvements/Upgrade shall include Capital Replacements as well as MOW. Capital Replacements shall, without limitation, include such tasks as rail replacement, rail grinding, replacement of ties over and above MOW, signalizations, undercutting, structural projects such as bridges and culverts, grade crossing improvements and grade separation projects as may be necessary to maintain FRA Class III standard. Costs for such Capital Replacements shall be apportioned as provided in Section 4.07 of this Agreement.

#### **4.06. Capital Replacement Plan.**

Commencing in 2005 and for each year thereafter, NERC and NERA shall, not later than October 1, provide to RTA an annual capital replacement plan for RTA's approval. RTA may, in the same plan, propose additional capital improvements. The plan shall include an itemized estimate and allocation of project costs. Project cost must be allocated in accordance with the provisions of this Agreement. The parties shall act in good faith to agree on an annual capital replacement plan. However, notwithstanding anything in this Agreement to the contrary, no funds of RTA, NERA or NERC shall be expended or committed for capital replacements or capital improvements without the express approval of their respective governing bodies which may be in the form of a budget.

#### **4.07. Compensation for Capital Replacements.**

After deduction of any Federal capital funds, RTA's share of the remaining local funding shall be determined in accordance with the following:

- (a) For rail grinding, rail and tie replacement, ballast, undercutting and related track material, the allocation shall be made in accordance with the ratio of train miles traveled in Commuter Rail Service on the Subject Line in the three (3) prior years to the total of train miles traveled by all users of the Subject Line over the same period of time. For the purposes of this calculation the train miles for all users other than RTA commuter trains shall be multiplied by a factor of six (6). This ratio will be reviewed for possible adjustment every five (5) years.

- (b) For signal system and telecommunications projects, the allocation shall be made in accordance with the ratio of Commuter Rail Service train moves over the subject Line in the three (3) prior calendar years to the total train moves of all users in service over the Subject Line over the same period of time. This ratio will be reviewed for possible adjustment every five (5) years
- (c) For bridge, culvert and other track and right-of-way structure projects, the allocation shall be made in accordance with the ratio of train miles traveled in Commuter Rail Service on the Subject Line over the three (3) prior calendar years to the total of train miles traveled by all users of the Subject Line over the same period of time. For the purposes of this calculation, the train miles for all users other than RTA commuter trains shall be multiplied by a factor of three (3). This ratio will be reviewed for possible adjustment every five (5) years.
- (d) For grade crossing improvement projects, including grade separation projects, the allocation shall be 50% to RTA and 50% to NERC.
- (e) For undercutting adjacent to mainline station platforms the allocation shall be 100% to RTA.
- (f) For facilities installed solely for the benefit of Commuter Rail Service, the allocation shall be 100% to the RTA.

A failure by any party hereto to fund properly approved Capital Replacements will be a breach of this Agreement.

#### **4.08. Ownership of Improvements.**

All new facilities constructed on NERA property shall immediately fall under the exclusive ownership of NERA. However, by addendum or amendment to this Agreement, certain facilities may be designated for the exclusive use of RTA with the concurrence of NERC and NERA so long as RTA continues to provide Commuter Rail Service.

#### **4.09. Future Conflicts with Freight Service.**

Should freight trains moves increase to the point that there are more than minimal freight and commuter rail conflicts, then the RTA will develop a capital investment strategy to minimize such conflicts. The parties agree that they will first meet, negotiate, and in good faith develop a scheduling strategy to avoid such conflicts.

## **SECTION 5. OPERATION OF COMMUTER RAIL SERVICE**

### **5.01. Service Plan.**

- (a) In the event that RTA selects NERC as the Operator of the Commuter Rail Service, NERC shall present to RTA and NERA an annual Service Plan including train schedules and train consists with locomotive(s) and coaches and any other matters agreed upon by the parties hereto. The Service Plan shall be submitted not later than October 1, 2005 and each succeeding year throughout the term of the **commuter** operating agreement and will cover the succeeding calendar year. No such Service Plan shall be effective unless specifically approved by RTA.
- (b) In the event that RTA selects an Operator other than NERC, RTA shall have the responsibility to submit an annual Service Plan to NERC and NERA at the same time and with the same content as stated above. RTA may delegate this responsibility to the Operator. RTA shall allow NERC and NERA to comment upon and propose changes to the Service Plan. NERC and NERA will not have authority to disapprove the Service Plan so long as the Service Plan does not include Commuter Rail Service outside of the Peak Periods provided in Section 5.05 of this Agreement. All Service Plans, once approved and adopted will become part of this Agreement by reference and be enforceable as if they were specifically stated herein.

### **5.02. Modifications to the Service Plan.**

Any party hereto shall have the right to propose modifications to an approved Service Plan. No modification of the initial Service Plan **that is due on October 1, 2005** as provided in Section 5.01 of this Agreement or any subsequent operating plan can take effect unless approved in writing by all parties to this Agreement. Compensation for any additional Commuter Rail Service, over and above that provided in the Initial Service Plan shall be that stated herein below so long as such additional service does not materially interfere with NERC's then current freight service. No modification that would require a Capital Improvement to the Subject Line shall be implemented until such Capital Improvement is complete.

### **5.03. Cost of Operations.**

Except as specifically provided in the Agreement, all costs of operation of the Commuter Rail Service on the Subject Line shall be the exclusive responsibility of RTA.

#### **5.04. Provision of Rolling Stock.**

RTA shall provide Rolling Stock to be used in Commuter Rail Service. The Rolling Stock shall comply with all applicable federal, state and local laws, regulations and enactments including, without limitation, the Federal Locomotive Inspection Act, the Federal Safety Appliance Act and the Boiler Inspection Act as the same may be amended, and with all regulations adopted under such Laws. The payment of any fine, penalty, cost or charge imposed for failure of the Rolling Stock provided by RTA shall be the sole responsibility of RTA or its contractor(s). All Rolling Stock shall be provided with radios and such other communications and signal devices that comply with the reasonable requirements established by NERC from time to time during the term of this Agreement. In the event NERC is not the Operator of Commuter Rail Service on the Subject Line, RTA and/or the Operator shall provide NERC with the opportunity to inspect any item of Rolling Stock before it is initially placed in service on the Subject Line.

#### **5.05. Dispatching.**

NERC or its subcontractors shall have exclusive control of the dispatching, management and operation of the Subject Line in a manner consistent with the terms of this Agreement. NERC shall grant priority use of the Subject Line for Commuter Rail Service Monday through Friday between the hours of 6:00 to 9:00 A.M. and 4:00 to 7:00 P.M. (the "Peak Periods"). RTA shall not schedule or publish a timetable for Commuter Rail Service outside of the Peak Period unless such an expansion is part of an approved operating plan. NERC shall grant priority use to any Commuter Rail Service that operates during the Peak Periods but is delayed, the same as if the service was operated totally within the Peak Periods. The parties will negotiate in good faith to resolve any recurring pattern of delays to Commuter Rail Service caused by NERC so that the Commuter Rail Service can maintain the schedule. Upon failure to reach agreement, the parties shall submit the dispute to arbitration as set forth in Section 9 of this Agreement, and the decision will be final on all matters properly set before the arbitration panel. A continual pattern of dispatching failure by NERC may, at RTA's discretion and upon reasonable written notice, allow RTA or its contractor to assume dispatching authorization for Commuter Rail Service. This provision shall not apply to any delays not caused by NERC.

#### **5.06. Observance of Laws and Rules.**

In the event that the Operator of the Commuter Rail Service is not NERC, RTA shall, by contract, require the Operator to observe and comply with all applicable Federal State and local laws, rules and regulations regarding the operation of trains in passenger service. Such laws rules and regulations shall, without limitation, include those pertaining to employee health, safety and environmental matters. RTA shall also require the Operator to observe and comply with all of NERC's rules, special

instructions, timetables, practices, regulations and orders governing operations on the Subject Line.

**5.07. Operating Personnel.**

All train crews involved in Commuter Rail Service must be fully qualified on the Subject Line by NERC for their respective positions. In the event that NERC is not the Operator of the Commuter Rail Service, all cost of qualification shall be borne by RTA and RTA shall bear the costs of any necessary pilots furnished by NERC pending qualification of the Operator's personnel.

**5.08. Mechanical Failures.**

Should any train providing Commuter Rail Service become stalled or unable to proceed on its own power or is unable to maintain sufficient speed for efficient operation of the Commuter Rail Service or is set out of a consist providing Commuter Rail Service on account of mechanical failure or any cause not resulting from an accident, collision or derailment, NERC shall, on request if NERC is not the Operator, provide locomotive power or other assistance as may be necessary to haul or push such train or equipment to continue its route to conclusion or to a siding or other agreed-upon site on the Subject Line or other portion of the railroad operated by NERC. In the event that NERC is not the Operator of the Commuter Rail Service, RTA or the Operator shall fully compensate NERC for its costs including reasonable profit to provide such assistance and RTA shall by contract require the Operator to forever indemnify, protect, defend and hold harmless NERC and NERA, their officers, agents and employees, from and against any and all liability, cost and expenses arising out of or connected with such assistance.

**5.09. Running Repairs.**

At the request of RTA or the Operator, NERC shall furnish the necessary labor and materials and perform running repairs to make any of RTA's Rolling Stock safe for movement to the closest terminal or shop. RTA shall fully compensate NERC for such running repairs. In the event NERC is not the Operator of the Commuter Rail Service, RTA shall by contract require the Operator to forever indemnify, protect, defend and hold harmless NERC and NERA, their officers, agents and employees, from and against any and all liability, cost and expenses arising out of or connected with such assistance.

**5.10 Clearing of Wrecks.**

If equipment used for the provision of Commuter Rail Service is derailed or otherwise disabled upon the Subject Line, to the extent that wrecking service is required to clear the Subject Line, NERC shall arrange for such service, including any necessary repair and restoration of roadbed, track, and structures. In the event NERC

is not the operator of the Commuter Rail Service, RTA, or its Operator, shall bear all expenses and incidental costs including reasonable profit for such service. RTA shall, by contract, require the Operator to indemnify and hold harmless NERC and NERA in accordance with Section 7.B.4. of this Agreement. Notwithstanding any provision in this Agreement to the contrary, NERC shall retain sole responsibility to clear the Subject Line of derailed or disabled equipment resulting from freight service on the Subject Line as expeditiously as reasonably possible to avoid interruption of Commuter Rail Service.

#### **5.11 Prevention of Delays.**

NERC and NERA recognize the importance of Commuter Rail Service on the Subject Line and will not conduct any train operations, maintenance of equipment or MOW or other activities on the Subject Line (or permit any other party to do so) during the Peak Periods that materially interfere with Commuter Rail Service or to deny priority use to Commuter Rail Service. If NERC fails to meet the foregoing requirements or fails to fulfill its dispatching obligations under Section 5.05 of this Agreement, then NERC shall pay liquidated damages as follows: \$500 for the first such occurrence, \$750 for the second such occurrence and \$1,000 for each day or portion thereof for each occurrence thereafter. The liquidated damages stated herein shall be increased by an amount equal to the increase in the Consumer Price Index on each tenth (10<sup>th</sup>) anniversary of the effective date of this Agreement.

#### **5.12 Maintenance of Equipment**

RTA shall have the management, direction and control of and shall perform, or cause to be performed, at its sole cost and expense, all work of maintaining, servicing, fueling and repairing its Rolling Stock, the Commuter Rail Stations, and any other structures erected and used solely for maintenance of equipment for Commuter Rail Service on or adjacent to the Subject Line. It is the intention of RTA to procure such maintenance services through a competitive procurement process that fully satisfies any applicable federal and state laws, regulations and guidelines. NERC may, at its option, participate as a vendor in any such procurement process. All Rolling Stock shall comply with the provisions of Section 5.04 of this Agreement prior to a day's operation. NERC may inspect any item of Rolling Stock to assure that it is in compliance with the provisions of this Agreement.

#### **5.13 Fares, Tickets Sales, Timetables**

RTA and/or its Contractor(s) shall be responsible for establishing fares, obtaining and printing public schedules and tickets, and distributing schedules to NERC and the public. RTA and/or its Contractor(s) shall be responsible for sales and distribution and revenue collection of all passenger tickets for Commuter Rail Service. Only RTA and/or its Contractor(s) shall have authority to issue tickets or passes for Commuter Rail Service.

#### **5.14. Operation of Commuter Stations**

As between the parties hereto, RTA shall bear all responsibility for operation and maintenance of all commuter rail passenger stations, including platforms, on the Subject Line. The commuter rail passenger stations shall comply with all applicable federal, state, and local laws and enactments, and shall also be maintained to a reasonably clean and safe condition. RTA may, at its discretion by contract, delegate the duties stated in this Section. **The parties recognize that upkeep and maintenance of the stations is of paramount interest to the signatories hereto and the community at large. If the stations are not maintained in a safe, clean and presentable manner, then a written notice of unsafe or unclean conditions will be delivered to the RTA. RTA shall have five (5) working days to cure such defect. Failure to cure will allow the NERA to remedy such conditions and bill RTA for such normal and reasonable costs.**

### **SECTION 6. COMPENSATION**

#### **6.01. Construction Work-Around Costs**

At the start of construction for the "Initial Capital Improvements" identified in section 3.01, the RTA will pay to the NERC / NERA a combined, total lump sum of \$200,000 for disruptions to freight service as a result of the construction of the capital improvements. **NERC and NERA shall determine the distribution of the \$200,000 payment.**

#### **6.02 Mobilization Costs**

Six (6) months prior to start-up of commuter rail operations on the corridor, RTA will pay to the NERC \$250,000 for NERC's required efforts to assemble, train, and provide staff and equipment for dispatching and maintenance-of-way necessitated by the advent of commuter rail operations.

#### **6.03 Base Usage Charge**

In consideration for the rights granted herein, including the maintenance-of-way services, the dispatching services, the rail line capacity committed, the liabilities assumed and all fees and expenses associated with the negotiation and consummation of this agreement, RTA shall pay **per year** to the NERC the sum of \$8 per train mile for the first twenty-five thousand miles, \$6 per train mile for the next twenty-five thousand miles and \$4 per train mile for train miles in excess of fifty thousand. This fee schedule shall be adjusted at the start of commuter rail service and every five years thereafter, in accordance with the CPI Index, starting on the date this agreement is signed.

#### **6.04 Monthly Billing**

**NERC may bill RTA monthly for all services provided, including the Base Usage Charge.**

### **SECTION 7. ALLOCATION OF LIABILITY**

A. Definitions: For purposes of this Section and Section 8, Insurance, the following definitions will apply:

1. "RTA Party" means one or more of (a) RTA's officers, board members employees, agents or contractors (other than a NERC or NERA Party) while on or using the Subject Line or performing duties relating to the Subject Line or otherwise performing duties relating to the provision of Commuter Rail Service, (b) Rail Commuter Passenger.
2. "Rail Commuter Passenger" or "Passenger" shall mean and include any and all persons, ticketed or unticketed, on the Subject Line for the purpose of using the Commuter Rail Service (except for RTA Parties, NERC Parties and NERA Parties) (a) while on board trains, locomotives, rail cars or rail equipment employed in the Commuter Rail Service and/or entraining and detraining therefrom, (b) while on the Subject Line and commuter stations for any purpose related to the Commuter Rail Service, including, without limitation, parking, inquiring about Commuter Rail Service or purchasing tickets therefore and coming to, waiting for, leaving from and/or observing commuter or other trains, locomotives, rail cars or rail equipment employed in the Commuter Rail Service, and (c) all persons meeting, assisting or in the company of any person described herein.
3. "NERC Party" shall mean one or more of (a) NERC's officers, directors, employees, agents or contractors while using or on the Subject Line in connection with the performance of duties related to the Subject Line, providing Commuter Rail Service, or otherwise providing contract services to NERC and excluding any such person who is a Passenger, (b) persons (other than a RTA Party) receiving services of NERC involving the Subject Line or on or using the Subject Line under authority of or by agreement with NERC, (c) any NERA Party or any NERC Party at or proximate to a commuter station on the Subject Line who is injured due to operation of a NERC train or improperly secured equipment or cargo on an NERC train on tracks at or adjacent to a commuter station.
4. "NERA Party" shall mean one or more (a) NERA's officers, board members, employees, agents or contractors (other than an RTA Party or Passenger) while on or using the Subject Line in connection with the performance of duties relating to the Subject Line (excluding any such person who is a Passenger).

B. Allocation of Liabilities with an Operator other than NERC.

In the event that NERC is not selected as the Operator of the Commuter Service, the following principles will apply:

1. As between the parties, RTA shall bear all loss or damage to an RTA Party, **and property** except as provided by the Operator's contract with RTA.
2. As between the parties, NERC shall bear all loss or damage to an NERC Party, except as provided by the Operator's contract with RTA.
3. As between the parties, RTA shall bear all loss or damage to a Passenger, except as provided by the Operator's contract with RTA.
4. RTA shall, by contract entered through the procurement process, require the Operator to defend and indemnify the parties hereto and any RTA Party, NERC Party and/or NERA Party for any personal injury, death, property damage, assessments, losses of whatever nature, damages, liabilities, costs and expenses, including without limitation interest, penalties and attorneys' fees and other costs of litigation arising out of the operation of Commuter Rail Service by the Operator, its officers, employees and/or agents including its sub or independent contractors, whether such acts or omissions are direct, consequential, indirect, incidental or otherwise arising out of or in connection with the Operator's operation of the Commuter Rail Service. RTA shall also, by contract entered through the procurement process, require the Operator to defend and indemnify the parties hereto and any RTA Party, NERC Party and/or NERA Party from any claims, damages, penalties, costs and attorneys fees arising from any failure of the Operator, its officers, employees and/or agents, including its sub or independent contractors, to observe applicable laws, including, but not limited to, labor laws and minimum wage laws.
5. NERC shall indemnify RTA and any RTA Party **and NERA and any NERA party** for any personal injury, death, property damage, assessments, losses of whatever nature, damages, liabilities, costs and expenses, to any NERC Party including without limitation interest, penalties and attorneys' fees and other costs of litigation, caused solely by any negligent act or omission of NERC, its officers, employees and/or agents including its sub or independent contractors, whether such acts or omissions are direct, consequential, indirect, incidental or otherwise arising solely out of operations by NERC on the Subject Line. NERC shall also indemnify RTA, any RTA Party and NERA **and any NERA party** from any claims, damages, penalties, costs and attorneys' fees arising from any failure of NERC, its officers, employees and/or agents, including its sub or independent contractors, to observe applicable labor laws, including but not limited to, workers compensation and minimum wage laws.

6. Whenever any loss of, damage to or destruction of any property whatsoever, or injury to or death of any person or persons whomsoever, occurs with the trains, locomotives, rail cars or rail equipment of, or in the account of, only NERC being involved, then (except as provided herein with respect to Passengers) NERC shall assume all liability therefore, and bear all cost and expense in connection therewith.
7. Notwithstanding any provision of this Agreement, as between the parties hereto, to the extent that any loss or damage is caused by or arises from the gross negligence or willful and wanton misconduct of a party hereto (including that party's officers, directors, agents and sub or independent contractors), such loss shall be borne exclusively by that party.
8. Except as may be provided by applicable rules of *res judicata*, the allocation of loss or damage provided in this Section 7 shall not be affected by any allocation of loss or damage as between a party hereto and a third person.
9. Notwithstanding any provision of this Agreement to the contrary, the parties hereto understand that RTA and NERA as local governing bodies within and political subdivisions of the State of Tennessee, cannot contractually indemnify and save harmless NERC, or any other party without the express authorization of the General Assembly of the State of Tennessee. As of the date of this Contract the parties acknowledge that no such authorization exists. In order to fulfill its obligations herein, RTA shall, as authorized by law, purchase insurance policies in the amount and with coverage as required by Section 8 of this Contract.

C. Allocation of liabilities with NERC as the Operator.

In the event that NERC is selected as the operator of the Commuter Rail Service, the following principles will apply:

1. As between the parties hereto, RTA shall bear all loss or damage to a RTA party, except as provided by the operating agreement for Commuter Rail Service.
2. As between the parties hereto, NERC shall bear all loss or damage to a NERC party.
3. As between the parties hereto, RTA shall bear all loss or damage to a RTA party, except as provided by the operating agreement for Commuter Rail Service.
4. As Operator, NERC shall provide all indemnities stated in subsection B. 4 of this Section 7.
5. As Operator, NERC shall defend and indemnify RTA and any RTA Party **and NERA and any NERA party** for any personal injury, death, property damage, assessments, losses of whatever nature, damages, liabilities, costs and expenses,

including without limitation interest, penalties and attorneys' fees and other costs of litigation caused by any negligent act or omission of NERC, its officers, employees and/or agents including its sub or independent contractors, whether such acts or omissions are direct, consequential, indirect, incidental or otherwise arising out of operations by NERC on the Subject Line. NERC shall also indemnify RTA and NERA from any claims, damages, penalties, costs and attorneys' fees arising from any failure of NERC, its officers, employees and/or agents, including its sub or independent contractors, to observe applicable labor laws. Including, but not limited to, workers compensation and minimum wage laws.

6. As Operator, NERC shall provide all the indemnities stated in subsection B. 5 of this Section 7.
7. Notwithstanding any provision of this Agreement, as between the parties hereto, to the extent that any loss or damage is caused by or arises from the gross negligence or willful and wanton misconduct of a party hereto (including that party's officers, directors, agents and sub or independent contractors), such loss shall be borne exclusively by that party.
8. Except as may be provided by applicable rules of *res judicata*, the allocation of loss or damage provided in this Section 7 shall not be affected by any allocation of loss or damage as between a party hereto and a third person.
9. Notwithstanding any provision of this Agreement to the contrary, the parties hereto understand that RTA and NERA as a local governing bodies within and political subdivisions of the State of Tennessee, cannot contractually indemnify and save harmless NERC, or any other party without the express authorization of the General Assembly of the State of Tennessee. As of the date of this Agreement the parties acknowledge that no such authorization exists. In order to fulfill its obligations herein, RTA shall, as authorized by law, purchase insurance policies in the amount and with coverage as required by Section 8 of this Agreement.

#### **7.01. Environmental Loss or Damage**

- A. Subject to Subsections 7. B.4., 7. B.7., and 7.C. 4., as between the Parties hereto, RTA and/or its contractors shall bear all environmental loss or damage including penalties and assessments, other than to a NERC Party, caused by or arising from the operation of Commuter Rail Service.
- B. Subject to Subsections 7.B. 4. and 7.B. 7., as between the parties hereto, NERC shall bear all environmental loss or damage including penalties and assessments, other than to an RTA Party, caused by or arising from NERC's operations on the Subject Line other than operation of Commuter Rail Service.

- C. Subject to Subsections 7.B.4., 7.B.7. and 7.C.4., if any environmental loss or damage including all penalties and assessments is caused by or arises or results from both the operation of Commuter Rail Service and NERC operations on the Subject Line other than operation of Commuter Rail Service, then, as between the parties, RTA and/or its contractors shall bear so much of such environmental loss or damage as was contributed by the operation of Commuter Rail Service and NERC shall bear so much of such environmental loss or damage as was contributed by NERC or an NERC Party other than the operation of Commuter Rail Service.

## **SECTION 8. INSURANCE REQUIREMENTS**

### **8.01. General Liability Insurance.**

RTA shall maintain General Liability insurance in an amount at least equal to \$200,000,000. RTA shall procure its insurance from a carrier(s) with an AM Best rating of A, and the form of such insurance policy shall be reasonably acceptable to NERC and NERA. Such insurance shall cover all of NERC's and NERA's liability. All liability policies shall name NERC and NERA as additional named insureds and shall provide cross liability coverage. Such coverage shall be added by endorsement in substantially the following language: "This policy shall insure each person, firm, or corporation hereunder in the same manner and to the same extent as if a separate policy had been issued to each, but the inclusion herein of more than one (1) insured shall not operate to increase the limits of the insurance company's liabilities." Such insurance may include a reasonable deductible or self-insured retention not to exceed \$10,000,000; provided, however, (i) that RTA demonstrates that it has the capability to cover any claim up to the amount of any such deductible or any such self-insured retention (ii) that RTA shall be permitted to increase the amount of the deductible or self-insurance retention if it demonstrates that it has established safeguards to ensure that NERC's and NERA's risk exposure is not greater than it would be with the \$10,000,000 deductible or self-insured retention, and (iii) if RTA elects to include any deductible or self-insured retention, RTA shall itself directly cover, in lieu of insurance, any and all of NERC's and NERA's liabilities that would otherwise, in accordance with the provisions of this Agreement, be covered by RTA insurance if RTA elected not to include a deductible or self-insured retention, and such direct coverage by RTA shall be in an amount equal to the amount of RTA's actual deductible or self-insured retention. For purposes of this paragraph: (i) references to NERC and NERA shall include their officers, directors, employees, agents, and contractors, to the extent they are performing duties for NERC and/or NERA related to this Agreement.

### **8.02. Third Party Insurance.**

RTA shall, by contract, require the Operator and any other third-party contractors that require access to the Subject Line for Commuter Rail Services to procure and

maintain general liability and other forms of insurance as needed insuring against any negligence and loss to the benefit of RTA with NERA and NERC as additional named insureds. All liability policies shall provide cross liability coverage. Such coverage shall be added by endorsement in substantially the following language: "This policy shall insure each person, firm, or corporation hereunder in the same manner and to the same extent as if a separate policy had been issued to each, but the inclusion herein of more than one (1) insured shall not operate to increase the limits of the insurance company's liabilities. Such insurance shall be primary as respects any coverage maintained by RTA. In the event that NERC is selected as the Operator, the insurance required by that contract shall be primary as respects any coverage maintained by RTA. However RTA reserves the right, if it so elects, to provide that one insurance policy shall be procured to provide coverage for RTA and the Operator.

#### **8.03. Basis for Insurance.**

Subject to Subsection 8.04, the General Liability insurance required hereunder shall be written on an occurrence basis and shall provide coverage for personal injury, bodily injury and death (including coverage under the Federal Employers Liability Act), and property damage. Such insurance shall include blanket contractual coverage, including coverage for this Agreement and specific coverage for the liability provisions set forth in this Agreement.

#### **8.04. Alternative Basis for Insurance.**

If General Liability insurance written on an occurrence basis as required by Subsections 8.01 and 8.03 is not commercially available or the annual cost of such insurance exceeds by 25% or more the cost of such insurance on a claims made basis, then RTA may, at its sole option, obtain such insurance written on a claims made basis; provide, however, that (i) other requirements of Sections 7 and 8 shall continue to apply; (ii) the parties shall confer in good faith to assure that there is a mutually acceptable program to protect against the risk of Loss or Damage, consistent with other provisions of Sections 7 and 8; and (iii) if and when the required insurance on an occurrence basis is again commercially available at an annual cost that does not exceed by 25% or more the cost of such insurance on a claims made basis then, upon written request by NERC and NERA, RTA shall promptly obtain such insurance once again on an occurrence basis. In the event RTA claims that it should be permitted, pursuant to this paragraph, to purchase General Liability insurance on a claims made basis, NERC and NERA shall be entitled (x) upon reasonable notice, to inspect RTA's insurance records in order to assess the commercial availability and cost of insurance, and (y) to identify any insurance written on an occurrence basis and otherwise meeting the requirements of this Agreement that is commercially available to RTA and does not exceed by 25% the cost of such insurance on a claims made basis. RTA may acquire tail coverage for the purpose of maintaining insurance

coverage for any period of time between the coverage on an occurrence basis and claims made basis.

**8.05. Loss of Limit of Liability.**

In the event the \$200 million per occurrence limitation under the Amtrak Reform and Accountability Act of 1997 (28 U.S.C. § 28103) (or a successor provision) is increased, decreased, eliminated, or held by a court of competent jurisdiction, including appeals, to be inapplicable to commuter rail service of the nature to be provided under this Agreement, then the Parties agree to reopen and renegotiate a new level of insurance intended to reflect any resulting change in either party's exposure to uninsured liability, giving due consideration to the additional costs or savings of such a change.

**8.06. Endorsements.**

Each insurance policy required by this section shall be endorsed to state that coverage shall not be suspended, voided, canceled, or amended except after 30 days prior written notice has been given to NERC and NERA.

**8.07. Qualification of Insurer.**

Each insurance policy shall be issued by financially sound insurers who may lawfully do business in the State of Tennessee.

**8.08. Certificate of Insurance.**

RTA will provide certificates of insurance evidencing the coverage set forth above prior to the commencement of the performance of any part of this Agreement and annually thereafter prior to expiration of the coverage. Upon reasonable written notice to RTA by NERC and NERA, RTA shall permit NERC and NERA to inspect and copy the policies.

**8.09. Maintenance of Liability Protection.**

In the event that RTA cannot or does not obtain the insurance coverage set forth above, then RTA either shall make other arrangements to provide equivalent liability protection for NERC and/or NERA, or NERC and/or NERA shall have the right, but not the duty, to purchase the insurance coverage and RTA agrees to reimburse NERC and/or NERA for the actual cost of such insurance should NERC and/or NERA purchase such insurance.

**8.10. Notice of Change to Insurance Coverage.**

RTA shall provide immediate written notice to NERC and NERA of any loss of insurance coverage and of any changes to any insurance policy it obtains under the provisions of this Agreement or in any manner related to Commuter Rail Service on the Subject Line.

**8.11. Loss of Insurance Coverage.**

Notwithstanding anything to the contrary in this Agreement, Should RTA or the Operator fail to obtain, or fail to keep in force, the insurance coverage(s) set forth in this Section 8, the operation of Commuter Rail Service shall be immediately suspended until satisfactory proof of such insurance is provided to NERC and NERA. Should RTA or the Operator fail to provide such proof of insurance within sixty (60) days, NERC and NERA may, at their option terminate this Agreement upon written notice to RTA, and retain any sums already paid them as liquidated damages. This right of termination is not subject to any dispute resolution provision contained in this Agreement.

**8.12 Separate Coverage for NERA.**

Prior to commencing Commuter Rail Service, RTA shall procure and maintain General Liability insurance coverage for NERA with an insurer that meets the qualifications of Section 8.01 of this Agreement with limits up to the limits of liability applicable to local governing bodies in the Tennessee Governmental Tort Liability Act, TCA. 29-20-403 as the same may be amended or re-codified. Such insurance may be a rider to the insurance policy required Section 8.01 of this Agreement.

**8.13. Notice of Claims.**

Each party hereto shall provide the earliest feasible notice of any claim to each other party to this Agreement in the manner required by their respective insurers.

**SECTION 9. DISPUTE RESOLUTION**

**9.01. Negotiation.**

**A. Preventing Conflicts.** The parties agree to use their best efforts to prevent and resolve sources of conflict before they escalate into disputes, claims, or legal actions.

**B. Resolving Disputes Through Negotiation.** The Parties agree to use their best efforts to resolve disputes arising out of or related to this Agreement using good faith negotiations by engaging in the following dispute escalation process should any such disputes arise:

(1) Level One.

- (a) If NERC is not the Operator of the Commuter Rail Service, the Operator's Chief Operating Officer for the Commuter Rail Service and NERC's designee shall meet to discuss and attempt to resolve the dispute in a timely manner. If they cannot resolve the dispute within fifteen (15) business days after referral of that dispute to Level One, either party may refer the dispute to Level Two.
- (b) In the event that NERC is the Operator of the Commuter Rail Service, RTA's Manager for Commuter Rail Service and NERC's Chief Operating Officer for Commuter Rail Service shall meet to discuss and attempt to resolve the dispute in a timely manner. If they cannot resolve the dispute within fifteen (15) business days after referral of that dispute to Level One, either party may refer the dispute to Level Two.

(2) Level Two.

- (a) The party that elects to pursue Level Two must reduce the dispute to writing.
- (b) In the event that NERC is not the Operator of the Commuter Rail Service, RTA's designee, the Operator's Chief Operating Officer NERC's designee and NERA's designee shall meet to discuss and attempt to resolve the dispute in a timely manner. If they cannot resolve the dispute within 15 days after referral of that dispute to Level Two, any party may proceed as provided elsewhere in this Section 9.
- (c) In the event NERC is the Operator of the Commuter Rail Service, RTA's designated board member, the President of NERC, and NERA's designee shall meet to discuss and attempt to resolve the dispute in a timely manner. If they cannot resolve the dispute within fifteen (15) days after referral of that dispute to Level Two, either party may proceed as provided elsewhere in this Section 9.

**C. Failure to Resolve a Dispute Through Best Efforts.** Except as otherwise specified in this Agreement, in the event the dispute is not resolved at Level Two within fifteen (15) business days after referral, the dispute may be referred to mediation or arbitration by agreement of all Parties hereto as described herein, however either party may commence a civil action in a court of competent jurisdiction, provided that any such lawsuit, except as provided in Subsection 9.02.G, may not be commenced after a dispute has been submitted for arbitration by agreement of all parties hereto under Section 9.02. At all times prior to resolution of the dispute, the Parties shall continue to perform and make any required payments

under this Agreement in the same manner and under the same terms as existed prior to the dispute.

## **9.02. Arbitration.**

### **A. General Provisions.**

If at any time a question or controversy shall arise between the Parties hereto in connection with this Agreement, or concerning the business or manner of transacting the business to be carried on under its provisions, or concerning the observance or performance of any of its covenants, or otherwise relating to this Agreement, upon which question or controversy the Parties cannot agree despite their best efforts pursuant to Section 9.01, such question or controversy may, upon agreement of the Parties regarding other disputes, be submitted to and settled by arbitration. For disputes arising under Subsection 13.03, arbitration shall be mandatory and binding pursuant to the terms of this Section, unless otherwise agreed to in writing by the Parties. For all other disputes, Neither party shall be compelled to arbitrate a question or controversy by reason of this Section 9.02, and both Parties shall have the unilateral right to condition their agreement to arbitrate a dispute pursuant to this Section 9.02 on changes to the arbitration rules and procedures set forth below. Unless other procedures are agreed to in writing by the Parties, arbitration between the Parties, pursuant to this Section 9.02, shall be governed by the rules and procedures set forth in this Section 9.02.

### **B. Initiation of Arbitration.**

If the Parties to the dispute are able to agree upon a single arbitrator within twenty (20) days after written notice by one party of its desire for arbitration to any other party, then the question or controversy shall be submitted to and settled by that single arbitrator. Otherwise, any party (the demanding party) may notify the other party (the noticed party) in writing of its demand for arbitration, stating the question or questions to be submitted for decision and nominating one arbitrator. Within twenty (20) days after receipt of such notice, the noticed party shall appoint an arbitrator and notify the demanding party, in writing, of such appointment. Should the noticed party fail, within twenty (20) days after receipt of such notice, to name its arbitrator, the arbitrator for the demanding party shall select an arbitrator for the noticed party so failing, and, if the arbitrator for the demanding party and the noticed party cannot agree on that selection, said arbitrator shall be appointed by the American Arbitration Association ("AAA") in compliance with the Rule of appointment of Neutral Arbitrator upon written notice to all other parties. The arbitrators so chosen shall select one additional arbitrator to complete the board. If they fail to agree upon an

additional arbitrator, the same shall, upon application of any party, be appointed by the AAA rules pursuant to the Rule for Appointment of Neutral Arbitrator. If an arbitrator declines or fails to act, the party (or parties in the case of a single arbitrator) who chose that arbitrator, or the AAA, as appropriate, shall appoint another to act in such arbitrator's place. Any arbitrator appointed by AAA under this Subsection 9.02.B shall possess knowledge or experience of the railroad industry and of commuter rail or of the particular matters at issue in the arbitration.

**C. Procedure.**

Upon selection of the arbitrator(s), said arbitrator(s) shall determine the questions raised in said notice or demand for arbitration within twenty (20) days, unless a different period of time is otherwise agreed upon by the Parties, said arbitrator(s) shall then give all parties reasonable notice of the time (which time shall be within thirty (30) days of the Arbitrator(s)' determination of the questions raised, unless a different period of time is otherwise agreed upon by the Parties), and place (of which the arbitrator(s) shall be the judge) of hearing evidence and argument; take such evidence as is admissible under the Federal Rules of Evidence with witnesses required to be sworn; and hear arguments of counsel or others.

**D. Decision of Arbitrator(s).**

After considering all evidence, testimony and arguments, said single arbitrator or said board of arbitrators or a majority thereof shall, within thirty (30) days of completion of the hearing provided for in Subsection 9.02C, promptly state such decision or award in writing. Said decision or award shall be final, binding, and conclusive on all parties to the arbitration when delivered to them, except as provided in Subsection 9.02G. A judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. Until the arbitrator(s) shall issue the first decision or award upon any question submitted for the arbitration, performance under the Agreement shall continue in the manner and form existing prior to the rise of such question. After delivery of said first decision or award, each party shall forthwith comply with said first decision or award immediately after receiving it, except for any award subject to Subsection 9.02G.

**E. Payment of Expenses.**

Each party to the arbitration shall pay the compensation, costs and expenses of the arbitrator appointed in its behalf and all fees and expenses of its own witnesses, exhibits, and counsel. The compensation, costs and expenses of the single arbitrator or the additional arbitrator in the board of arbitrators shall be paid in equal shares by both parties to the arbitration.

**F. Applicable Federal Laws.**

The books and papers of all parties, as far as they relate to any matter submitted for arbitration, shall be open to the examination of the arbitrator(s). The arbitration shall be governed by the U.S. Arbitration Act, 9 U.S.C. §§ 1-16, to the exclusion of any provisions of the state law inconsistent therewith or which would produce a different result, and by Federal Rules of Civil Procedure 26 through 37 and Federal Rules of Evidence. The arbitrator(s) shall have the authority to enter awards of equitable remedies consistent with the obligations of NERC and/or NERA and RTA under this Agreement, other than with regard to the allocation of costs and fees as provided for under Subsection 9.02E of this Agreement, except as provided in Subsection 9.02G.

**G. Impermissible Award.**

The arbitrator(s) shall not have the authority to enter any award, the satisfaction of which by the party to be bound, would be impermissible under any law, regulation, or funding agreement to which the bound party is subject. The determination of any such impermissibility shall be made by a court of competent jurisdiction, including appeals, within the State of Tennessee and under the laws of the State of Tennessee.

**H. Remedies at Law Preserved.**

Notwithstanding any other provision of this agreement to the contrary, any party may commence a civil action in a court of prominent jurisdiction and is not required to enter into arbitration except by mutual agreement.

## **SECTION 10. HAZARDOUS MATERIALS**

**10.01 Reporting Requirements.**

NERC shall immediately notify RTA of a release of hazardous materials, hazardous substances, or hazardous waste, as defined under federal or Tennessee law. In the event NERC is not the Operator, NERC shall immediately provide such notice to the Operator as well. Likewise RTA shall provide notice to NERC and NERA of any such release.

**10.02 Removal of Hazardous Materials.**

NERC shall be responsible for cleaning up any such release of Hazardous Materials in accordance with all applicable regulatory requirements of the federal government, the State of Tennessee, and the local governments. RTA and (in the event NERC is not the Operator of the Commuter Rail Service) the Operator may have a representative at the scene of any release of Hazardous Materials. Such representative shall have no authority over the site other than to obtain a status of the condition to assure that commuter rail operations are accommodated. Such representative shall be qualified by NERC to be on the railroad right-of-way.

### **10.03 Costs of Removal.**

The costs of the activities described in this Section 10 shall be borne in accordance with Section 7 of this Agreement.

## **SECTION 11. SPECIAL EVENT TRAINS**

RTA and (in the event NERC is not the Operator of Commuter Rail Service) the Operator may propose to NERC the operation of one or more special trains related to particular events ("Special Event Trains"). NERC shall have the right to review, approve (with or without proposed modifications in the scheduling of such trains), or reject the operation of any such Special Event Train, based on its reasonable determination, made in consultation with RTA, as to whether the proposed Special Event Train would unreasonably interfere with existing freight or other operations on the Subject Line or with scheduled track maintenance. RTA shall compensate NERC, under a budget to be agreed upon in writing, in advance of the operation of any such train.

## **SECTION 12. CESSATION OF COMMUTER TRAINS**

RTA shall retain sole authority to cause the cessation of the operation of any commuter train on all or a portion of the Subject Line or to cease the operation of Commuter Rail Service on a temporary or permanent basis. If, at RTA's direction, the operation of all Commuter Rail Service ceases on all or a portion of the Subject Line for a period of two (2) or more years, NERC shall be provided a reasonable period of time to restore, if necessary, track and signal systems to FRA Class III standards. RTA shall not be liable for any loss or damage resulting from cessation of Commuter Rail Service in whole or in part; provided, however, that if cessation of such operations: (i) is directed by RTA under this Section 12; (ii) exceeds three (3) consecutive months in duration; and (iii) was not directed by RTA as a result of a default by NERC of any obligation under this Agreement or any other contract between RTA and NERC, then RTA or its contractor(s) shall be responsible for the reasonable cost to NERC and/or NERA resulting from the resumption of Commuter Rail Service in whole or in part.

## **SECTION 13. TERMINATION**

### **13.01 Termination by RTA for Convenience**

RTA may terminate this Agreement for convenience, in whole or in part, at any time by written 120 day notice to NERC and/or NERA. RTA and/or its contractors shall reimburse NERC and/or NERA for any cost that arises directly from the termination of this Agreement. RTA and/or its contractor(s) shall reimburse NERC for any work performed by NERC under this Agreement up to the date of termination. In the event of any such termination, NERC and/or NERA may request, in writing, that any structure, such as platforms or fencing, installed solely for Commuter Rail Service, remains on the Subject Line as property of NERC and/or NERA. NERC and/or

NERA shall assume full responsibility for any such retained structure, including compliance with any applicable federal, Tennessee, or local law and/or regulation. RTA and/or its contractor(s) will remove any structure installed solely for Commuter Rail Service that is not so retained or reimburse NERC its reasonable costs to remove same.

### **13.02. Default By NERC or NERA.**

**A.** For purposes of this Agreement, and unless otherwise specifically defined elsewhere in this Agreement, a default by NERC or NERA shall be a breach of a material obligation of this Agreement that remains uncured after reasonable written notice under the circumstance by RTA.

**B.** Due to the public interest in Commuter Rail Service, the parties hereto recognize and agree that money may not be a sufficient remedy in the event of a default by NERC and/or NERA and that RTA shall be entitled to specific performance, injunctive relief, and/or any other equitable relief for any such default. Any such equitable remedy shall not be deemed to be the exclusive remedy for breach of this Agreement by NERC and/or NERA, but shall be in addition to all other remedies available at law or equity.

**C.** In the event of a default by NERC and/or NERA, RTA shall have the right to terminate this Agreement by written notice to NERC and NERA, and to recover its costs and damages as a result of such default **under the limitations stated herein.** RTA may seek a determination of default and of its costs and damages through arbitration under Section 9 of this Agreement or through a court of competent jurisdiction. RTA shall in no event be entitled to any prospective profits or reimbursements of prospective overhead, general expenses, project costs and administrative expenses; **however, the entitlements under this provision as to any claim against NERA shall be limited to the sum of fifty (\$50,000.00) thousand dollars, adjusted every five (5) years according the CPI Index.**

**D.** In addition to any other remedy stated in this Section 13.02, RTA may, at its option, undertake any task or function necessary in order to continue to provide Commuter Rail Service on the Subject Line.

### **13.03 Default By RTA**

**A.** NERC and NERA shall not be required to perform under this Agreement during any period of time in which:

(1)(a) RTA is in arrears in its payment to NERC of monthly charges required by this Agreement in an amount exceeding \$30,000;

(b) RTA and/or the Operator fails to maintain the insurance required by Section 8 of this Agreement and NERC and/or NERA does not procure insurance as provided under Section 8.09;

(2) Such failure or failures described above continue for thirty (30) days after written notice from NERC and/or NERA to RTA.

Any disagreement or dispute under this Section 13.03.A shall be promptly submitted for dispute resolution as defined by Section 9 of this Agreement.

**B.** Notwithstanding any other provision of this Section 13.03, if at any time RTA is in arrears in its payments of monthly charges required hereunder to NERC in an amount exceeding \$30,000, upon the failure to cure said default within thirty (30) days of written notification by NERC and/or NERA of the default, NERC shall have the right, so long as such default is uncured and continuing, to terminate this Agreement by written notice to RTA. RTA shall have the right to cure any such default at any time prior to written notice of termination.

**C.** Suspension of this Agreement pursuant to the provisions of Section 13.03A shall not toll the running of the thirty (30) day periods set forth in Subsections 13.03 A and B above.

#### **13.04. Rights Upon Termination.**

**A.** No termination or cancellation of this Agreement shall release either party from any liability or obligation under this Agreement, whether of indemnity or otherwise, resulting from any acts, omissions or events happening prior to the date of such termination or cancellation.

**B.** In the event of early termination of this Agreement for any reason, NERC and/or NERA and subcontractors shall in no event be entitled to prospective profits or reimbursement of prospective overhead and general expenses, administrative expenses, or damages (consequential or otherwise) because of such termination. Except for payment as expressly provided for herein, NERC and/or NERA hereby relieve and release RTA from any liability for early termination of this Agreement. For purposes of the preceding sentence, RTA includes, without limitation, its directors, officers, and employees, the State of Tennessee and political subdivision thereof that is a member of RTA.

### **SECTION 14. NOTICES AND DESIGNATION OF AGENT FOR SERVICE OF PROCESS**

#### **A. To RTA:**

REGIONAL TRANSPORTATION AUTHORITY  
ATTN: Eric Beyer, Executive Director

Addr. 501 Union Street, Sixth Floor  
Nashville, TN 37219-1705

Designated Agent: \_\_\_\_\_, Chairperson  
Regional Transportation Authority  
Addr: 501 Union Street, Sixth Floor  
Nashville, TN 37219-1705

**B. To NASHVILLE AND EASTERN RAILROAD AUTHORITY**

**NASHVILLE AND EASTERN RAILROAD AUTHORITY**  
**ATTN: NERA Managing Director**  
**ADDR: 609 South Maple Street**  
**Lebanon, TN 37087**

Designated Agent:

\_\_\_\_\_

ATTN:  
ADDR:

**C. To NASHVILLE AND EASTERN RAILROAD CORP.**

**NASHVILLE AND EASTERN RAILROAD CORP.**  
**ATTN: Vice President, General Manager NERC**  
**ADDR: 518 Knoxville Ave.**  
**Lebanon, TN 37087**

Designated Agent:

\_\_\_\_\_

ATTN:  
ADDR:

**SECTION 15. AUDIT AND RECONCILIATION**

**15.01. Audit.**

NERC and/or NERA shall maintain documentation for all charges to RTA under this Agreement. The books, records and documents of NERC and NERA, insofar as they relate to work performed or money received under this Agreement, shall be maintained for a period of not less than three (3) years from the date of final payment for any calendar year. Such books, records and documents shall be subject to audit, at any reasonable time and upon reasonable notice by RTA, the State of Tennessee, and

any political subdivision thereof, that makes a financial contribution to Commuter Rail Service on the Subject Line, or their duly appointed representatives. Such records shall be maintained by NERC in accordance with the accounting standards applicable to railroads and by NERA in accordance with the accounting standards applicable to railroad authorities in Tennessee.

#### **15.02 Reconciliation.**

Upon the completion of any audit conducted under Section 15.01 hereof, NERC and/or NERA shall credit RTA and reimburse RTA for any amounts paid by RTA that are not supported by the records maintained or by the services performed by NERC and/or NERA. In the event such audit reveals that RTA did not reimburse NERC and/or NERA in the amount required by this Agreement, RTA shall likewise credit or reimburse NERC and/or NERA for such amount. Any adjustment required to make any reconciliation required shall be made, paid, or credited, as the case may be, in the first payment due by RTA following such reconciliation.

### **SECTION 16. AMENDMENT**

#### **16.01. Amendments In Written Form.**

Except as otherwise expressly provided in this Agreement, no waiver, modification, addition, or amendment to this Agreement shall be of any force or effect unless reduced to writing executed by the authorized officers or agents of each party.

#### **16.02. Unforeseen Events.**

In the event of an occurrence not reasonably foreseeable when this Agreement was executed that has a material impact on the compensation established under this Agreement, the Parties will negotiate in good faith and use their best efforts to agree upon an appropriate amendment to the applicable contract provision. If the Parties cannot agree upon such an amendment, or if other issues arise under this Section upon which the Parties cannot agree, the Parties agree that any third -party resolution of such issues shall be through the dispute resolution process as provided in Section 9. Pending a final decision in such proceeding, the Parties shall continue to perform under and be bound by the terms of this Agreement, as it exists without any proposed amendment.

#### **16.03. Limitation On Arbitration.**

Neither party shall resort to dispute resolution for purposes of this Section 16 during the first three (3) years of this Agreement and neither party shall resort to such dispute resolution more than one time in any three-year period. No adjustment to

compensation under this Section 16 shall be made retroactively for any period prior to the time an arbitration proceeding is formally initiated.

## **SECTION 17. REGULATORY APPROVALS**

It is the understanding of the Parties that no prior approval of or exemption from regulation is required with respect to this Agreement. In the event that the Parties determine that any such prior approval or exemption is required, however, securing such approval or exemption shall be the responsibility of RTA and Commuter Rail Service will not commence until any such approval or exemption becomes effective. NERC and NERA shall cooperate and support any effort by RTA to obtain a necessary approval or exemption pursuant to this section, or to obtain a determination that no such approval or exemption is required.

## **SECTION 18. EMERGENCIES**

### **18.01. Force Majeure.**

Each party will be excused from performance of any of its obligations to the other hereunder, where such non-performance is caused by any event beyond the non-performing party's reasonable control, which may include, without limitation, an order, rule, or regulation of any federal, state, or local government body, agency, or instrumentality, work stoppage by NERC's employees or a labor dispute resulting in a strike by NERC's employees, extraordinary unavailability of essential materials from third-party suppliers, accident, natural disaster, or civil disorder ("Force Majeure Event"); provided that the party excused hereunder shall use all reasonable efforts to minimize its non-performance and to overcome, remedy, or remove such Force Majeure Event in the shortest practical time. NERC shall use its best efforts to undertake and complete the repair, restoration, or replacement of any property which is necessary for the provision of services in accordance with the Service Plan to allow the resumption of normal commuter operations and performance of its other obligations hereunder as soon as reasonably possible.

### **18.02. Notification and Consultations With RTA.**

In the event NERC determines that a Force Majeure Event will or may prevent or impair Commuter Rail Service, it shall immediately notify RTA's executive director or his/her designee. Where practicable, without endangering the public safety, NERC shall consult with RTA prior to declaring a Force Majeure Event or other emergency requiring the cessation or reduction in Commuter Rail Service, and shall consult during any such cessation or reduction in services in order to determine the appropriate course of action regarding Commuter Rail Service.

## **SECTION 19. PARTNERSHIP/JOINT VENTURE**

Nothing herein shall in any way be construed or intended to create a partnership or joint venture between the parties or to create the relationship of principal and agent between or among any of

the parties. None of the parties hereto shall hold itself out in a manner contrary to the terms of this paragraph. No party shall become liable for any representation, act, or omission of any other party contrary to the terms of this paragraph.

## **SECTION 20. ENTIRE AGREEMENT**

This Agreement and the Appendices attached hereto and made a part hereof embody the entire agreement and understanding between RTA and NERC and NERA relating to the subject matter contained herein. There are no restrictions, promises, representations, warranties, covenants, or undertakings, oral or otherwise, than those expressly set forth or referred to herein.

## **SECTION 21. WAIVER**

The duties and obligations imposed by this Agreement and the rights and remedies available hereunder shall be in addition to and not a limitation of or waiver regarding any duties, obligations, rights and remedies otherwise available by law. No waiver of any provision of this Agreement shall affect the right of any of any party thereafter to enforce such provision or to exercise any right or remedy available to it in the event of any other default.

## **SECTION 22. CONTINGENT FEES**

NERC and NERA hereby represents that they have not been retained or retained any persons to solicit or secure any contract with RTA upon an agreement or understanding for a contingent commission, percentage, or brokerage fee, except for retention of bona fide employees or bona fide established commercial selling agencies for the purpose of securing business. Breach of the provisions of this paragraph is, in addition to a breach of this Agreement, a breach of ethical standards that may result in civil or criminal sanction.

## **SECTION 23. APPLICABLE LAW**

Except as otherwise specifically provided in this Agreement and except exclusive jurisdiction lies in federal law and regulations, the validity, construction, and effect of this Agreement and any and all extensions and/or modifications thereof shall be governed by the laws of the State of Tennessee. Tennessee law shall govern regardless of any language in any attachment or other document that NERC and/or NERA may provide.

## **SECTION 24. VENUE**

Any action between the parties arising under this Agreement shall be maintained in an appropriate state or federal court within Tennessee

## **SECTION 25. ASSIGNMENT – CONSENT REQUIRED**

The provisions of this Agreement shall inure to the benefit of and shall be binding upon the respective successors and assignees of the parties hereto. Except for the rights of money due to

NERC and/or NERA under this Agreement, neither this Agreement nor any of the rights and obligations of NERC or NERA or RTA hereunder shall be assigned or transferred in whole or in part without the prior written consent of the other parties **which consent shall not be unreasonably withheld**. Any such assignment or transfer shall not release any party from its obligations hereunder. Any attempt to transfer or assign this Agreement without such consent shall be null and void. NOTICE OF ASSIGNMENT OF ANY RIGHTS TO MONEY DUE TO NERC AND/OR NERA UNDER THIS AGREEMENT MUST BE SENT TO THE ATTENTION OF FISCAL OFFICER, GREATER NASHVILLE REGIONAL COUNCIL, 501 UNION STREET, SIXTH FLOOR, NASHVILLE, TENNESSEE 37219-1705.

## **SECTION 26. BENEFIT LIMITED TO PARTIES**

This Agreement is intended for the sole benefit of the Parties hereto. Nothing in this Agreement is intended or may be construed to give any person or entity, other than the Parties hereto, their permitted successors, and permitted assigns, any legal or equitable right, remedy, or claim under this Agreement.

## **SECTION 27. SEVERABILITY**

In the event that any term, covenant, condition, or provision of this Agreement or the application thereof to any person or circumstance is found to be invalid or unenforceable in any respect, the remainder of this Agreement or the application of such term or provision to persons or circumstances shall nevertheless be binding with the same effect as if the invalid or unenforceable provision were originally deleted. The Parties agree to bargain in good faith to reform this Agreement or replace any invalid or unenforceable provision with a valid and enforceable provision that comes as close as possible to the intention of the invalid or unenforceable provision.

## **SECTION 28. PREPARATION**

The Parties and their legal counsel have cooperated in the drafting of this Agreement. Accordingly, this Agreement shall be deemed the joint work product of the Parties and not be construed against either party by reason of such preparation.

## **SECTION 29. HEADINGS**

The section headings of this Agreement are for convenience and reference only and in no way define, limit, or describe the scope or intent of the section of this Agreement.

## **SECTION 30. COUNTERPARTS**

This Agreement shall be simultaneously executed in duplicate counterparts, each of which so executed shall be deemed to be an original, and such counterparts together shall constitute one and the same instrument.

# EXHIBIT B

**OPERATIONS AND MAINTENANCE  
SERVICES CONTRACT  
BETWEEN THE  
REGIONAL TRANSPORTATION  
AUTHORITY AND TRANSIT  
SOLUTIONS GROUP, LIMITED  
LIABILITY COMPANY**

January, 2006  
Revision 4

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## SOLICITATION, OFFER, AWARD AND EXECUTION

### SOLICITATION, OFFER, AWARD AND EXECUTION

**1. PROJECT TITLE AND BRIEF DESCRIPTION:** RFP No. 2004-01- The Nashville Regional Transportation Authority (RTA) is soliciting request for proposals for the operation and maintenance of equipment of the Music City Star commuter rail service. Commencement of the services shall be on October 24, 2005, with mobilization planning to commence within 14 days after issuance of the Notice to Proceed.

<b>2. SOLICITATION - CONTRACT NO.</b> Request for Proposals (RFP) 2004-01	<b>3. TYPE OF SOLICITATION:</b> <input type="checkbox"/> Sealed Proposal (IFB) <input checked="" type="checkbox"/> Negotiated RFP (RFP)	<b>4. TYPE OF CONTRACT:</b> <input checked="" type="checkbox"/> Firm Fixed Price	<b>5. DATE ISSUED:</b> October 8, 2004
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**6. CONTRACTING OFFICER:**

Ms. Allyson Shumate  
 Project Manager  
 Music City Star  
 Nashville RTA  
 501 Union Street Sixth Floor  
 Nashville, TN 37219  
 (615) 862-8833 (Phone)

**7. TECHNICAL PROJECT MANAGER:**

Mr. W.T. "Bill" Farquhar  
 Director of Commuter Rail  
 Nashville RTA  
 501 Union Street  
 Sixth Floor  
 Nashville, TN 37219-1705  
 (615) 862-8841  
 (615) 862-8840(fax)

### SOLICITATION

**8. DUE DATE FOR RECEIPT OF OFFERS:**

Sealed proposals in the quantities specified in Information for Offers shall be accepted at the place specified in Block 6 until 2:00 p.m. Central Standard Time on December 8, 2004. All proposals are subject to all terms and conditions contained in this solicitation.

Deleted: or

**CAUTION - Late submissions, modifications and withdrawals will be rejected and discarded unless arrangements are made by the Proposer for return.**

**9. DISADVANTAGED BUSINESS ENTERPRISE (DBE) GOAL**

The RTA is committed to maximizing DBE participation. An 8% DBE participation goal has been established for this project. All Proposers are strongly encouraged to afford DBE firms the maximum opportunity to participate as partners.

### OFFER

**11. MINIMUM ACCEPTANCE PERIOD:**

In compliance with the above, the undersigned agrees that the acceptance period of the Proposal is one hundred and fifty (150) calendar days after the date of receipt of Proposals specified in block 8, *Due Date for Receipt of Offers*, as amended.

**12. ACKNOWLEDGMENT OF AMENDMENTS - See Attachments**

<b>13. NAME AND ADDRESS OF PROPOSER:</b>	<b>13A. NAME/TITLE OF PERSON AUTHORIZED TO SIGN PROPOSAL:</b>  <b>13B. TELEPHONE AND FACSIMILE NUMBERS:</b>
<b>14A. ATTEST (Signature)</b>	<b>15A. SIGNATURE:</b>
<b>14B. NAME AND TITLE:</b>	<b>15B. DATE OF PROPOSAL:</b>

### AWARD

<b>17. AWARD AMOUNT:</b>	<b>18. SIGNATURE:</b>	<b>19. DATE</b>
--------------------------	-----------------------	-----------------

<b>20. SUBMIT INVOICES TO (Original and one copy):</b> Ms. Allyson Shumate Project Manager Music City Star Nashville RTA 501 Union Street Sixth Floor Nashville, TN 3129 (615) 862-8833 (Phone)	<b>21. EXECUTIVE DIRECTOR'S NAME:</b> William T. Farquhar Regional Transportation Authority 501 Union St., 6th Floor Nashville, TN 37219-1705 (615) 862-8833 (Phone) (615) -880-3901 (Fax)	
	<b>22. ATTEST (Signature):</b>	<b>23. DATE</b>
	<b>24. TITLE:</b>	

**25. PERIOD OF PERFORMANCE:**

The period of performance is for five years, with one five-year option for a total up to ten years.

The term of the Contract is effective \_\_\_\_\_ and shall remain in effect through \_\_\_\_\_ ("Contract Term"), unless otherwise terminated pursuant to the terms of the Contract.

The effective period of this Contract is from date of award through April 30, 2011, or five years from the starting date of revenue service for the base period and for a one five-year option period, whichever comes last. However, option years will be exercised at a later date, if applicable.

**IMPORTANT - Award will be made on this form or by other authorized official written notice.**

**26. CONTRACT EXECUTION:**

This instrument shall not constitute a Contract until executed in writing by the Contractor and the Executive Director of the RTA or his designee. The Contractor's representative, by signature on this instrument, represents and warrants that he/she possesses the actual authority to enter into this Contract on behalf of the Contractor. The undersigned do hereby state that this Contract is executed in duplicate, as though each were an original and that there are no oral agreements that have not been reduced to writing in this instrument.

This Contract entered into as of the day and year first written above.

(INSERT CONTRACTOR NAME):

NASHVILLE RTA:

By:

Name:

By:

Mayor Bill Orange, RTA Chair

## SECTION 1 – CONTRACT

This Operations and Maintenance Contract hereinafter referred to as the Contract, made and entered into this \_ day of \_, 2005, by and between the Regional Transportation Authority (hereinafter referred to as RTA) and Transit Solutions Group, Limited Liability Company (hereinafter referred to as TSG).

### RECITALS:

**WHEREAS**, the RTA is an entity created by the Tennessee General Assembly for the purpose of planning for and implementing transit services within its member jurisdictions; and

**WHEREAS**, the RTA solicited Request for Proposals (RFP) 2004-01 for the operations and maintenance of equipment for the Music City Star commuter service on November 11, 2004; and

**WHEREAS**, TSG was the successful proposer; and

**WHEREAS**, TSG is a recognized firm capable and willing to perform this task.

**NOW, THEREFORE**, in consideration of the premises, the mutual covenants and promises herein set forth, and other good and valuable considerations, receipt and legal sufficiency of which is hereby acknowledged, RTA and TSG (herein referred to as the Contractor) do mutually agree as follows:

### **1.1 TERMS AND CONDITIONS**

#### **1.1.1 Contract Documents**

The following documents constitute the Contract:

- a. This Document
- b. Request for Proposals (RFP) 2004-01
- c. All Addenda
- d. TSG's Proposal dated December 8, 2004
- e. Best and Final Offer (BAFO) – revised and original
- f. Change Orders and Contract Modifications
- g. Approved exceptions to the RFP.
- h. Insurance Requirements

See also paragraph E, Contract Documents, Part I: General Provisions of the RFP.

Deleted: Part II

#### **1.1.2 Order of Precedence**

- a. Change orders and contract modifications
- b. This contract,
- c. Approved exceptions to documents (Appendix A)
- d. Revised BAFO

- e. Original BAFO
- f. TSG's Proposal dated December 8, 2004
- g. Addendums, and
- h. Solicitation, offer, award and execution form
- i. RFP.

#### **1.1.3 Notice Of Award**

The acceptance of a Proposal for award, if made, shall be evidenced by submittal of the Solicitation, Offer, Award and Execution document to the Contractor for signature. No other act by RTA shall evidence acceptance of a Proposal.

#### **1.1.4 Notice To Proceed**

It is the intent to give Notice to Proceed (NTP) after receipt of all documentation (insurance, bonds, signed contracts, etc.) required from the Contractor. The Contractor is required to submit original copies of the signed contract along with required documentation within 10 days of RTA Board action. The NTP is expected to be issued within 15 days of RTA's receipt of the signed contract and required documentation. Any delay in NTP will not be allowed to delay scheduled deliveries. Such notice shall obligate said Contractor to commence work under the terms of this contract.

#### **1.1.5 Independent Contractor Status**

The Contractor has a skilled, trained, knowledgeable, and experienced staff in the area of transportation operations and maintenance of equipment. The Contractor is offering its services under this Contract as an independent contractor to RTA. In determining the existence of Contractor's independent contractor status, the common law right to control shall apply. It is understood and agreed by RTA and the Contractor that the Contractor is and shall be viewed, treated and held out to be an independent contractor. As such the Contractor shall be responsible for any federal, state, and local taxes and fees applicable to payment hereunder. The Contractor and its employees are not employees or agents of RTA and are not eligible nor will receive any benefits through the RTA, including without limitation federal social security, railroad retirement, workman's compensation, FELA, health or dental or prescription or life insurance benefits, credit union or deferred compensation plans, and annual and sick leave benefits.

#### **1.1.6 Conflict Of Interest**

The Contractor hereby certifies that neither it nor its officers, directors or agents, presently has any interest and shall not acquire any interest, direct or indirect, which would conflict in any manner or degree with the performance of services required to be performed under this Contract. The Contractor further certifies that in the performance of this Contract no person having any such interest shall knowingly be employed.

#### **1.1.7 Covenants Against Gratuities And Contingent Fees**

The Contractor hereby certifies that it has not employed or retained any company or person, other than a bona fide employee working for the Contractor, to solicit or secure

disabilities have the same right as other persons to use mass transportation service and facilities, and that special efforts shall be made in planning and designing those services and facilities to implement those policies.

The Contractor and its subcontractors will comply with all applicable requirements of section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 794, which prohibits discrimination on the basis of handicaps, and with the Americans with Disabilities Act of 1990 (ADA), as amended, 42 U.S.C. §§§§ 12101 et seq., which requires the provision of accessible facilities and services, and with the following Federal regulations, including any amendments thereto:

- (1) U.S. DOT regulations, "Transportation Services for Individuals with Disabilities (ADA)," 49 C.F.R. Part 37;
- (2) U.S. DOT regulations, "Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting from Federal Financial Assistance," 49 C.F.R. Part 27;
- (3) Joint U.S. Architectural and Transportation Barriers Compliance Board/U.S. DOT regulations, "Americans With Disabilities (ADA) Accessibility Specifications for Transportation Vehicles," 36 C.F.R. Part 1192 and 49 C.F.R. Part 38;
- (4) U.S. DOJ regulations, "Nondiscrimination on the Basis of Disability in State and Local Government Services," 28 C.F.R. Part 35;
- (5) U.S. DOJ regulations, "Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities," 28 C.F.R. Part 36;
- (6) U.S. GSA regulations, "Accommodations for the Physically Handicapped," 41 C.F.R. Subpart 101-19;
- (7) U.S. Equal Employment Opportunity Commission, "Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act," 29 C.F.R. Part 1630;
- (8) U.S. Federal Communications Commission regulations, "Telecommunications Relay Services and Related Customer Premises Equipment for the Hearing and Speech Disabled," 47 C.F.R. Part 64, Subpart F; and
- (9) FTA regulations, "Transportation for Elderly and Handicapped Persons," 49 C.F.R. Part 609; and
- (10) Any implementing requirements FTA may issue.

#### **1.1.12 No Third Party**

Nothing expressed or implied in this Contract is intended or shall be construed to confer any rights or remedies under or by reason of this Contract upon any Person or entity other than the Parties or their respective successors and permitted assigns. Nothing in this Contract is intended to relieve or discharge the obligations or liabilities of any third person or entity to any of the Parties.

#### **1.1.13 Entire Contract**

See paragraph F, Entire Contract, Part I: General Provisions of the RFP shall apply.

Deleted: Part II

#### 1.1.14 Relationship of Parties

See paragraph I, Relationship of Parties, Part I: General Provisions of the RFP shall apply.

Deleted: Part II

#### 1.1.15 Prevailing Party

See paragraph M, Prevailing Party, Part I: General Provisions of the RFP shall apply.

Deleted: Part II

#### 1.1.16 Governing Laws

Deleted: .¶

See paragraph O, Governing Law, Part I: General Provisions of the RFP shall apply.

Deleted: Part II

#### 1.1.17 Insurance

See paragraph P, Insurance, Part I: General Provisions of the RFP shall apply. Except the following sentence is added after the third sentence ending "in connection with the provision of Services." The exclusion of insurance coverage for an employee, agent, or invitee of the Contractor or its subcontractor(s) does not include Rail Commuter Passengers.

Deleted: Part II

In the second sentence amend "Such insurance shall cover bodily injury and property damage...." to read "Such insurance shall cover all claims, including , but not limited to bodily injury and property damage....."

#### 1.1.18 Definition of Days

Days are to equal business days.

### 1.2 CONTRACT TERM

The effective period of this Contract is from date of award through April 30, 2011, or five years from the starting date of revenue service for the base period and for a one five-year option period, whichever comes last. However, option years will be exercised at a later date, if applicable.

#### 1.2.1 Performance Period

Unless specified otherwise, the performance period of the Contract is for the Contract Term.

#### 1.2.2 Option To Extend Contract Term

The RTA, in its sole discretion, reserves the right to extend the contract for an additional five years, subject to successful negotiations between the RTA and the Contractor.

If the RTA exercises its option to extend the Contract Term, the extended Contract shall include all terms and conditions of the Contract with exception of the option to extend.

#### 1.2.3 Maximum Term Of Contract

The total duration of this Contract, including the exercise of any options under this clause, shall not exceed ten years.

### **1.3 CONTRACT PARTIES**

#### **1.3.1 Parties**

Parties to the Contract are RTA and the TSG (hereinafter referred to as "Contractor").

#### **1.3.2 Succession**

The Contract will be binding on the parties, their successors, and assignees.

#### **1.3.3 Assignment – Consent Required**

The provisions of the Contract shall inure to the benefit of and shall be binding upon the respective successors and assignees of the parties hereto. Neither this Contract nor any of the rights and obligations of the Contractor hereunder shall be assigned or transferred in whole or in part without the prior written consent of the RTA. Such consent shall not reasonably be withheld. Any such assignment or transfer shall not release the Contractor from its obligations hereunder.

If the Contract or any of the Contractor's obligations hereunder, is assigned in whole or in part by the Contractor, the Contractor will remain obligated and liable under the terms of the Contract. Such consent shall not reasonably be withheld.

#### **1.3.4 Subletting and Subcontracting**

This contract may not be assigned, sublet or transferred without the written consent of RTA.

#### **1.3.5 Office Location/Travel**

RTA will not provide office space except as noted in the RFP, travel reimbursement, or equipment for the Contractor personnel. The RTA will not reimburse personnel relocation under this Contract. It is the responsibility of the Contractor to pay for any and all specialty staff identified in the proposals that are needed for specific assignments on this Contract from the Contract amount.

### **1.4 CONTRACT ADMINISTRATION**

The following describe the roles and responsibility of individuals who will be the primary points of contact for RTA on matters regarding contract administration as well as other administrative information.

#### **1.4.1 Contracting Officer**

RTA's Contracting Officer is the individual with the delegated authority to administer this Contract on behalf of RTA. The Contracting Officer is solely responsible, under direction from the Technical Project Manager, for authorizing services by issuing written orders, and for making any changes to the scope of services, schedule or other contractual terms and conditions by written Contract Modification. No oral representations of any nature form the basis of or may amend the Contract.

The Contracting Officer may delegate certain specific responsibilities to its authorized representative – RTA's Technical Project Manager.

This Contract will be administered by:

Ms. Allyson Shumate  
Project Manager  
Music City Star  
Nashville RTA  
501 Union Street, Sixth Floor  
Nashville, TN 31219  
(615) 862-8833 (Phone)

Written communications shall make reference to the Contract number and shall be mailed to the above address.

#### **1.4.2 RTA Technical Project Manager**

RTA's Technical Project Manager will provide day-to-day management of the Contractor and ensures that the operations and maintenance services are satisfactory to RTA. RTA's Technical Project Manager is solely responsible for authorizing services by directing the Contract Officer to issue written orders, and for making any changes to the scope of services, schedule or other contractual terms and conditions by written Contract Modification. No oral representations of any nature form the basis of or may amend the Contract. The Technical Project Manager is additionally responsible for requesting services, approving invoices and monitoring the Contractor's performance.

The RTA Technical Project Manager is the Commuter Rail Director, or his / her designee.

#### **1.4.3 Technical Direction**

The Technical Project Manager will provide technical direction on Contract performance. Technical direction includes direction that assists the Contractor in accomplishing the required services; and review, comment on, and approval/acceptance of reports or other deliverables.

Technical direction must be within the Contract's scope. The Technical Project Manager may not issue technical direction which (1) institutes additional work outside the scope; (2) constitutes a change in the scope; (3) causes an increase or decrease in the fixed price in excess of \$50,000; (4) alters the performance period; or (5) changes any of the other express terms or conditions of the Contract, without performing the appropriate change order process.

The Technical Project Manager shall issue technical directions in writing, or shall confirm any oral technical direction in writing within five calendar days after issuance. RTA shall not be responsible to pay for work performed by Contractor that is performed due to oral technical direction and not confirmed by either party in writing within five calendar days after issuance.

#### **1.4.4 Contractor's Assigned Personnel**

The Contractor shall assign only competent and qualified personnel to provide services as set forth in this Contract and shall at all times be solely responsible for their work quality. RTA may request the removal of individual employees for cause at any time, subject to investigation. Should the investigation substantiate cause, the Contractor agrees to comply and to promptly provide acceptable replacement personnel. Rejection by RTA and removal of assigned personnel shall not relieve the Contractor of its full responsibilities under the Contract, and shall not provide the basis for any claim or cause of action.

#### **1.4.5 Scope and Limitation**

- (A). The RTA, as part of this Contract and this Scope of Services, will provide or furnish the following:
1. Assistance and oversight in instruction, training and supervision in regards to compliance with federal and state regulations, and RTA service quality goals.
  2. Revenue and Special Event schedules for Music City Star passenger services. The RTA will provide a request to the Contractor for special event / charter service at least three weeks prior to said event. The Contractor will respond within one week of receiving this request, advising the RTA of the ability to perform this service. Such requests will not be reasonably withheld.
- (B.) The RTA, as part of this Contract and this Scope of Services, will not do, require, provide, or furnish any of the following:
1. The Contractor means of performance of this Contract are within the Contractor's exclusive control.
  2. Oversight or control or direction in the modes, ways, methods, details, manner or means of how the contractor is to perform the services under this contract.
  3. A schedule or routine of work.
  4. Infringe or inhibit the Contractor's right and ability to employ others in assisting the Contractor in the performance of this Contract except that the Contractor shall warrant to RTA the following:
    - a) The Contractor shall ensure that minority business enterprises, as defined in 49CFR Part 26, have the maximum opportunity to compete for and participate in the performance of any subcontracts or team arrangements utilized by the Contractor to complete this Contract.

- b) The Contractor affirms that it does not subscribe to any personnel policy which permits or allows for the promotion, demotion, employment, dismissal or laying off of any individual due to the individual's race, creed, color, national origin, age or sex, or which is in violation of applicable laws concerning the employment of individuals with disabilities or any other classification protected by Federal and / or Tennessee State Constitutional and / or statutory laws.
  - c) TSG warrants that no part of the total Contract amount of compensation shall be paid directly or indirectly to an employee or official of the State of Tennessee, the federal government, or the RTA as wages, compensation, or gifts in exchange for actions as officer, agent or employee, subcontractor, or consultant to TSG in connection with any work contemplated or performed relative to this contract.
5. Hold out, present, or imply that the Contractor is an agent, representative, or employee of the RTA to others.

#### **1.4.6 Right of the RTA to Refuse or Reject Work Products of the Contractor**

The RTA will neither exercise direct or indirect control or supervision over the method, details, process, or hours per day worked by the Contractor in performing its work output nor in how the Contractor is to do the work or perform the services as outlined in the "Scope of Services," but the RTA retains and may exercise a right to refuse or reject any and all work products or results of the Contractor's work for cause.

#### **1.4.7 Official Communications**

Communications in connection with this Contract shall be in English, in writing and shall be delivered personally, or by regular, registered, or certified mail addressed to the officer(s) or employee(s) of RTA and of the Contractor designated to receive such communications. Telephone calls, facsimile and electronic mail may be used to expedite communications but shall not be official communication unless confirmed in writing, as stated above.

### **1.5 LAWS AND REGULATIONS**

#### **1.5.1 Compliance with Law**

The Contractor agrees that it will comply with applicable federal, state, and local laws and regulations in performance of its services under this Contract.

#### **1.5.2 Discrepancy or Inconsistency**

If the Contractor discovers any discrepancy or inconsistency between this Contract and any Laws and Regulations, the Contractor shall immediately notify the RTA's Contracting Officer and Technical Project Manager in writing.

### 1.5.3 Violation of Laws

The Contractor shall give the Contracting Officer immediate written notice of any violation of Laws by the Contractor that concerns services to the RTA, including its employees, agents or contractors, and, at its sole cost and expense, must promptly rectify any such violation.

### 1.5.4 Applicable Laws and Regulations

See paragraph N, Applicable Laws and Regulation, Part I: General Provisions of the RFP.

Deleted: Part II

## 1.6 CONTRACT TYPE – FIRM FIXED PRICE

This is a Firm Fixed Price Contracts. As such, pricing shall include all necessary indirect and direct costs for labor, materials, taxes and other fees, including, but not limited to, personnel salaries, labor burden, subcontractors, consumable supplies, printing, binding and reproduction, telephone, telex, telegraph, shipping and postage charges, and other direct costs and expenses which are necessary for the proper performance of the work under this Contract.

RTA shall compensate the Contractor in accordance with the terms and conditions of this Contract at the prices agreed upon. Notwithstanding anything contained herein to the contrary, the maximum firm fixed price amount to be paid to the Contractor for all work performed under this contract shall not exceed the amount negotiated, unless additional work is authorized by RTA in writing.

## 1.7 PAYMENT TERMS

Payments for mobilization and operations and maintenance services are found in the RFP. Payments and (b) Part II: Scope of Services, paragraph H, Payments.

Deleted: Part II

### 1.7.1 Invoice Requirements

A proper invoice shall include a unique invoice number; description of the items or services provided; the date the goods were delivered or the inclusive dates the services were rendered; the Contract price(s); applicable sales tax and use fees; the basis for the billing; any relevant supporting documentation; the Contract or purchase order number; the Contractor's Federal Employees Identification Number or Social Security Number; and the name and address of the proper invoice recipient.

### 1.7.2 Payment Provisions

For the purposes of the Contract, an amount will not be deemed due and payable if:

1. The amount invoiced is inconsistent with the Contract;
2. The proper invoice has not been received by the party specified in the Contract;
3. The invoice or Contract performance is in dispute or the Contractor has failed to otherwise comply with the conditions of the Contract;
4. The items or services have not been accepted;
5. The quantity of items delivered is less than the quantity invoiced;
6. The items or services do not meet the quality requirements of the Contract;
7. The Contractor has not submitted required documentation or other evidence reasonably required by RTA or by the Contract concerning performance under the Contract and compliance with its conditions; or
8. The invoice is not in the proper format, as required by RTA.

### **1.7.3 Payments to Contractor**

The Contractor shall receive payments in accordance with the RFP with the exception of mobilization. These invoices will be submitted monthly, for costs incurred during the previous month. The RTA will approve the invoices within 5 days and pay undisputed items within 10 days after approval.

Deleted: apy

The Contractor will submit a letter to the RTA if payment is late, indicating the RTA is in default. The RTA will have 30 days to cure a default situation.

#### **Final Payment – Release Of Claim**

As a condition precedent to final payment, the Contractor shall execute a general release of all future or additional claims against RTA arising out of, or in any way connected with, the Contract.

## **1.8 MEETINGS**

### **1.8.1 Kick Off Meeting**

Within two weeks of Notice to Proceed, a kick off meeting will be held at the RTA offices. At this meeting, detailed procedures will be discussed for handling the project.

### **1.8.2 Project Meetings**

RTA may schedule project meetings with reasonable notice throughout the progress of the Work. Contractor attendance at these meetings is mandatory.

## **1.9 MODIFICATIONS TO CONTRACT**

### **1.9.1 RTA Originated Changes**

RTA may at any time by written order designated or indicated to be a Change Order, make any change in the work within the general scope of their respective Contract per paragraph R, Changes, Part I: General Provisions of the RFP.

Deleted: Part II

This Contract may be modified only by a written amendment which has been executed and approved by the appropriate parties as indicated on the signature page of the Contract or officials so authorized to do so.

### **1.9.2 Contractor-Originated Changes**

The Contractor may also submit proposals for changing the requirements of the Contract for the benefit of RTA. The proposals shall be based upon a rigorous analysis made by the Contractor documenting how the proposed change:

1. Would provide a superior product for RTA;
2. Would result in an increase or decrease in the total Contract price;
3. Would not impair any essential function or characteristic of the product, such as safety, service life, reliability, economy of operation, and ease of maintenance;
4. Would affect the Contract delivery dates; and/or
5. Would require modifications to the Contract Documents.

The RTA may accept in whole or in part any proposal submitted pursuant to this article by issuing a Change Order that will identify the proposal on which it is based. The Change Order will modify the Contract documents and, if appropriate, adjust the Contract price.

### **1.9.3 Adjustments In Compensation For Changes**

An adjustment in compensation shall mean an increase or decrease in Contract prices due to changes. An equitable adjustment in compensation will be made for changes which cannot, in the judgment of RTA, be fairly and reasonably paid for at Contract prices. No allowance will be made for loss of anticipated profit on any portion of the work not performed by reason of a change in the work. Adjustments in compensation will be made as follows:

1. By negotiation of the parties on the basis of their estimate of increases or decreases in the costs of the work due to the changes; provided that upon RTA written request the Contractor shall, within ten (10) working days or other timeframe as may be agreed, submit its detailed estimate of such increases or decreases in costs, with cost breakdowns and other appropriate data supporting such estimate.

2. RTA on the basis of its own estimates of increases or decreases in the costs of the work due to the changes, if the Contractor fails to submit its estimate of such increases or decreases in costs in the manner and within the time provided; or if in the opinion of RTA the parties fail to negotiate a fair and equitable adjustment within a reasonable time.
3. In the event a bid item is eliminated the maximum amount credited to RTA for the work described in the Change Order shall not exceed the actual costs incurred for material and labor.

Deleted:

#### **1.9.4 Prosecution Of Changes**

Upon receipt of an executed Change Order, the Contractor shall comply therewith and shall prosecute all portions of the work ordered or affected thereby with the same diligence and in the same manner as if the changes were originally included in the initial Contract.

#### **1.9.5 Change Order Cancellations**

Each Change Order issued in connection with the Contract shall be subject to being cancelled by RTA within 10 working days of being executed. In the event of such cancellation, the maximum charge to RTA for the work described in the Change Order shall not exceed the actual costs incurred for material and labor.

#### **1.9.6 Value Engineering Change Proposal**

See paragraph S, Value Change Proposals, Part I: General Provisions of the RFP.

Deleted: Part II

#### **1.9.7 Cost Or Pricing Data**

If the Contractor has submitted cost or pricing data in connection with the pricing of any Contract item or modification to the Contract, unless the pricing was based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, or prices set by law or regulation, RTA shall have the right to examine and audit books, records, documents, and other data of the Contractor (including computations and projections) related to negotiating, pricing, or performing the work in order to evaluate the accuracy, completeness, and currency of the cost or pricing data.

#### **1.9.8 Current Cost Or Pricing Data For Changes Over \$50,000**

This article applies to any modification to this Contract involving aggregate increases and/or decreases in costs, plus applicable profits, of more than \$50,000; unless the modification price is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, or set by law or regulation.

For applicable modifications, the Contractor shall submit a Certificate of Current Cost or Pricing Data (Appendix B). In this certificate, the Contractor shall certify that, to the best of its knowledge, the cost or pricing data furnished or identified in the Contractor's request for adjustment are accurate, current, and complete as of the date the Contract is amended for said adjustment.

Certificates from Subcontractors are required if the price adjustment includes subcontracts or changes to subcontracts. The Contractor shall insert the substance of the following in each subcontract that exceeds \$50,000:

1. Before awarding any subcontract expected to exceed \$50,000, or pricing any subcontract modification involving aggregate increases and/or decreases in costs, plus applicable profits, expected to exceed \$50,000, the Contractor shall require the Subcontractor to submit cost or pricing data, unless the price is based on adequate competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, or set by law or regulation.
2. The Contractor shall require the Subcontractor to submit a Certificate of Current Cost or Pricing Data (Appendix A), that to the best of its knowledge and belief, the data submitted under the sub-article above were accurate, complete and current as of the date of agreement on the negotiated price of the subcontract or subcontract modification.

#### **1.10 SUSPENSION OF WORK**

RTA may in its sole discretion, by written notice to the Contractor, suspend the Contractor's performance under this Contract in whole or in part at any time. Upon receipt of such notice, the Contractor shall discontinue work to the extent specified in the notice; continue to protect and maintain the work product; and take any other steps to minimize costs associated with such suspension.

Upon immediate notification of a suspension of work, the Contractor shall contact the Contracting Officer to identify costs that will still occur that RTA will participate in. RTA and the Contractor will resolve which costs RTA will participate in. However, no adjustment shall be made under this clause for any suspension, delay, or interruption to the extent: (1) that performance would have been so suspended, delayed, or interrupted by any other cause, including the fault or negligence of the Contractor or (2) for which any equitable adjustment is provided for or excluded under any other provision of this Contract.

#### **1.11 NOTICE TO RTA OF LABOR DISPUTES**

Whenever the Contractor has knowledge that any actual or potential labor dispute is delaying or threatens to delay the timely performance of the Contract, the Contractor shall immediately give notice thereof, including all relevant information with respect thereto, to RTA.

The Contractor shall insert the substance of this section in any subcontract hereunder. Each subcontract shall provide that if its timely performance is delayed or threatened by

delay by any actual or potential labor dispute, the subcontractor shall immediately provide their contractor, on the next higher tier, or the prime Contractor as the case may be, with all relevant information regarding the dispute.

## **1.12 DISPUTES**

See paragraph L, Disputes, Part I: General Provisions of the RFP.

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## **1.13 CLAIMS**

### **1.13.1 Notice Of Claims**

Claims for additional compensation or time for an act or failure to act on the part of RTA shall be by a written notice of the claim.

The Notice of Claim shall set forth the reasons for which an adjustment is due, the nature of the costs involved, and an estimate of the amount of the potential claim. The Notice of Claim shall be given to RTA within thirty (30) calendar days of the occurrence of the event giving rise to the claim and prior to the start of any work because of it. RTA will respond to the Notice of Claim within fifteen (15) working days of its receipt, advising the Contractor as to whether the claim has merit. If RTA deems that the claim has no merit, the Contractor shall be so advised and may pursue remedies available under the article entitled "Disputes" (paragraph L, Disputes, Part I: General Provisions of the RFP). If RTA determines that the claim has merit, the Contractor shall be advised to submit a formal claim.

Deleted: Part II

Requirements of this article are intended to enable RTA to investigate the facts on a timely basis in order to minimize or avoid any effects of a claim. Failure of the Contractor to provide the required Notice of Claim on time is likely to disadvantage RTA. Therefore, no claim will be considered unless the Contractor has given notice within the time allotted.

### **1.13.2 Claim Procedure**

Claims filed by the Contractor shall be in sufficient technical and price detail to enable RTA to ascertain the basis for both the claim and the amount claimed. When requested, the Contractor shall furnish any further information and details required by RTA to determine the facts or evaluate the contentions involved in the claim. Failure to submit such information will be cause for denying the claim.

A claim shall be submitted no later than thirty (15) working days after RTA responds to the Contractor's Notice of Claim, unless an extension of time is authorized by RTA. The parties shall negotiate an equitable adjustment and the Contract will be amended by bilateral Change Order accordingly.

The Contractor shall continue to perform its obligations in a timely manner during any claims proceedings unless RTA directs otherwise by written instruction.

### **1.13.3 Claims and Fraud**

Claims against RTA arising from this Contract shall be forfeited by any person who corruptly practices or attempts to practice any fraud against RTA in the proof, statement, establishment, or allowance thereof.

#### **1.14 CONTRACT TERMINATION**

See paragraph U, Termination. Part I: General Provisions of the RFP.

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##### **1.14.1 Bankruptcy Or Insolvency**

RTA shall have the right to terminate the Contract, without further cost or liability, in the event of the occurrence of any of the following: insolvency of the Contractor; liquidation or dissolution of the Contractor; the institution of any voluntary or involuntary bankruptcy proceeding by or against the Contractor; assignment by the Contractor for the benefit of creditors; or the appointment of a receiver or trustee to manage the property of the Contractor. Termination for bankruptcy or insolvency shall be immediate upon written notice thereof.

##### **1.14.2 Termination Due to Funding Discontinuation**

Should funding for this Contract be discontinued by Tennessee Department of Transportation or any other RTA funding source, RTA shall have the right to terminate the Contract upon written notice to the Contractor. The Contractor shall be paid amounts due for work prior to termination.

##### **1.14.3 Termination by Notice**

RTA may terminate this Contract at any time upon thirty (30) calendar day's written notice to the Contractor. The Contractor shall be paid amount due for work prior to termination.

#### **1.15 MATERIAL**

##### **1.15.1 Identification Of Goods To The Contract**

Any and all products, equipment, supplies or other material in the possession of the Contractor and designed or intended for use in the work shall be clearly marked or otherwise designated as part of the goods to which the Contract refers and shall be segregated from other Contractor products, equipment and materials.

#### **1.16 RIGHTS AND RESPONSIBILITIES**

##### **1.16.1 RTA Access To Work**

RTA shall at all times have access to the work wherever it is being prepared or in progress. The Contractor shall provide all facilities for safe access to enable RTA to perform its functions and responsibilities under the Contract, and shall provide access for authorized representatives of RTA and the funding sources (e.g. Federal Transit Administration, Tennessee Department of Transportation) for the purpose of inspecting

the work. RTA shall have the right to obtain or take photographs. RTA will exercise the utmost possible care to protect "trade secrets" when obtaining or taking photographs of the Contractor's facilities.

#### **1.16.2 Timely Transfer Of Information**

RTA will cooperate fully with the Contractor to make available all information pertaining to the work under this Contract which may be in the possession of RTA, to furnish required information within a reasonable time for the orderly progress of the work, and to examine all reports submitted by the Contractor and render decisions thereon in a prompt manner so as not to delay the Contractor.

#### **1.16.3 Availability of Funds**

This Contract is subject to the RTA receiving sufficient funds. Should adequate funds not become available, the terms of the Contract, by mutual agreement and upon written modification executed by both parties, may be altered to conform with the availability of funds or at the discretion of the RTA the contract may be terminated.

#### **1.16.4 Standard of Performance**

The Contractor shall perform the work under this Contract with the same high degree of professional skill, sound practices and good judgment normally exercised by reputable professional firms providing services of similar nature. In addition, the Contractor shall, at its expense, re-perform the work to correct any deficiencies, which result from the Contractor's failure to perform in accordance with the above standards, and as required under the Contract. RTA shall notify the Contractor in writing of any deficiencies and shall approve the method and timing of corrections.

#### **1.16.5 RTA Review Does Not Constitute Waiver**

RTA's receipt and review of any of the information provided to it shall not operate to excuse or waive any violation or non-performance under this Contract or other Applicable Laws.

#### **1.16.6 No Waiver**

The failure of RTA on one or more occasion to exercise a right, to require the Contractor's compliance or performance with an obligation under this Contract, or any other applicable law, or RTA's failure to pursue a breach thereof shall not be deemed to constitute a waiver of such right, obligation or breach.

The Contractor's shall not be excused from such right, obligation, or breach unless such right, obligation or breach has been specifically waived in writing by the Contracting Officer. No express written waiver of any default or the performance of any provision hereof shall affect any other default or performance, or cover any other period of time, other than the default, performance or period of time specified in such express waiver. One or more written waivers of a default or the performance of any provision hereof shall not be deemed to be a waiver of a subsequent default or performance of the same or any other provision.

#### 1.16.7 Waiver

Waiver by the Contracting Officer or the Contractor of any breach of any of the terms of this Contract by the other party shall not be deemed to be a waiver or elimination of such term, nor of any subsequent breach of the same type, nor of any other term of the Contract. The subsequent acceptance of any payment of money or other performance required by this Contract shall not be deemed to be a waiver of any preceding breach of any term of the Contract.

#### 1.16.8 Subcontracts

See paragraph K, Subcontracts, Part I: General Provisions of the RFP.

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### 1.17 LIMITATION OF LIABILITY, INDEMNIFICATION, AND HOLD HARMLESS

It is expressly agreed and understood between the RTA and the Contractor that the Contractor is an independent contractor to the RTA and as such should be viewed in law and equity as an independent contractor.

It is the intent and purpose of this Contract and it is so agreed by the RTA and the Contractor that as an independent contractor no vicarious liability shall be imposed upon the RTA by any actions of the Contractor in the performance of this Contract nor shall the doctrine of respondent superior be applicable to the RTA through this Contract.

During the performance of this Contract, the Contractor agrees to carry liability insurance for its employees, agents, and invitees in an amount of at least \$1,000,000, with the RTA named as an "additional insured".

The RTA shall have no liability due to the performance of this Contract by the Contractor except as specifically provided for in this Contract to which the Request For Proposal is appended..

See also paragraph Q, Liability and Indemnification, Part I: General Provisions of the RFP.

Deleted: adequate public liability for liabilities they may have as identified in the Request For Proposal and other appropriate forms of insurance. Such coverages shall be in an amount of \$1,000,000 and name the RTA as a "Named Insured"

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### 1.18 PATENTS AND COPYRIGHTS

#### 1.18.1 Responsibility

The Contractor shall warrant that the materials, equipment, devices, or processes used on or incorporated in the work shall be delivered free of any rightful claim of any third party for infringement of any patent or copyright. The Contractor shall defend or may settle, at its expense, any suit or proceeding against RTA or its representatives based on a claimed infringement that would result in a breach of this warranty. The Contractor shall pay all damages and costs awarded therein due to such breach, unless a suit is brought concerning a product or material specified for use by RTA.

The Contractor shall bear all costs arising from the use of patented materials, equipment, devices, or processes used on or incorporated in the work. In case material, equipment, devices or processes are held to constitute an infringement and their use is enjoined, the Contractor, at its expense, shall either:

1. Secure for RTA the right to continue using said materials, equipment devices, or processes by suspension of the injunction or by procuring a license or licenses;
2. Replace such materials, equipment, devices, or processes with noninfringing materials, equipment, devices or processes; or
3. Modify them so that they become noninfringing or remove the enjoined materials, equipment, devices or processes and refund the sum paid therefore without prejudice to any other rights of RTA.

#### **1.18.2 Indemnification**

The Contractor shall indemnify and hold harmless RTA and its officers, agents, employees, and consultants from any and all liability of any nature or kind, including reasonable costs and expenses for infringement or use of any copyrighted or uncopyrighted composition, secret process, patented or unpatented invention, article or application furnished or used in connection with the Contract. This provision shall not apply to any specific product designated for use by RTA.

### **1.19 RECORDS**

#### **1.19.1 Rights To Audit And Inspect**

The Contractor shall maintain all working papers, reports, and all other records pertaining to this Contract and to the work covered by this Contract, for a period of not less than three (3) years following final payment by RTA, or, if the Contract is terminated in whole or in part, until three (3) years after final termination settlement.

Said records shall be made available for inspection by authorized representatives of RTA, the U.S. Department of Transportation, the Comptroller General of the United States of the U.S. General Accounting Office, and the Tennessee State Attorney General's Office during regular working hours at the Contractor's place of business. Records pertaining to appeals under disputes, to litigation or to the settlement of claims arising under or relating to the performance of the Contract shall be made available for three (3) years after contract implementation or until disposition of the appeals, litigation, or claims, whichever is later.

The Contractor shall include, or have included, the requirements of this article in all subcontracts of any tier.

#### **1.19.2 Accounting Records**

The Contractor shall maintain an accounting system under which its accounts can be readily identified with its system of accounts classification for this Contract that follow generally accepted accounting principles. Such accounting system shall be capable of providing the information required by this Contract.

#### **1.19.3 Maintenance of Records**

The Contractor shall maintain documentation for all charges against the Contract. The books, records and documents of the Contractor, insofar as they relate to work performed or money received under the Contract, shall be maintained for a period of three (3) full years from the date of final payment and will be subject to audit, at any reasonable time and upon reasonable notice by the RTA, the Federal Transit Administration and the Tennessee Department of Transportation or their duly appointed representatives. The records shall be maintained in accordance with generally accepted accounting principles.

#### **1.19.4 Ownership of Reports and Documents**

See paragraph H, Ownership of Reports and Documents, Part I: General Provisions of the RFP.

Deleted: Part II

### **1.20 OWNERSHIP OF WORK PRODUCT/ASSIGNMENT OF PRODUCT RIGHTS**

All work performed by the Contractor under this Contract shall be considered work made for hire and shall be the property of the RTA. All work products and exhibits produced by the Contractor in the performance of this Contract shall be owned by the RTA and, on completion or termination of the Contract, the Contractor shall deliver these materials to the RTA.

The Contractor hereby assigns to the RTA all rights, title and interest, including but not limited to copyright rights, in all notes, data, reports, imagery, computer programs and documentation, and other materials resulting from its work under this Contract.

### **1.21 FORCE MAJEURE**

The Contractor shall not be deemed in default of a provision of this Contract where performance was rendered impossible or delayed by causes beyond the Contractor's reasonable control, including, but not limited to wars or riots, labor strikes or civil disturbances, floods, earthquakes, fire, explosions, or epidemics, or other acts of God, and this Contract shall not be revoked or Contractor penalized for such noncompliance, provided that the Contractor takes immediate and diligent steps to bring itself back into compliance with this Contract and to comply as soon as possible under the circumstances without unduly endangering the health, safety, and integrity of the Contractor's employees or property, or the health, safety, and integrity of the public, public rights-of-way, public property, or private property.

Acts beyond the Contractor's reasonable control shall include extraordinary and unforeseeable delays in obtaining necessary permits, licenses and agreements following the Contractor's timely and complete submittal of all required application materials and

the diligent pursuit thereof so long as the Contractor has not sought a waiver or exception of any standard requirement. It is expressly agreed and understood that the Contractor shall account for, and include in the Contractor's scheduling, ordinary delays and obstacles in obtaining permits, licenses and agreements, and the Contractor shall commence its permitting and approval processes with sufficient advance time to allow for such delays without impacting the Contractor's construction schedule.

Acts beyond the Contractor's reasonable control shall not include (i) failure to obtain financing or have adequate funds, or (ii) work shortages when qualified workers are available. The provisions of this section shall have no application unless a party seeking an extension of time for performance under this Contract shall have first notified the other party in writing of the cause or causes thereof within thirty days after its reasonable determination that an event may constitute a force majeure delay under this section.

## **1.22 PUBLICATIONS, PUBLICITY AND ENDORSEMENTS**

### **1.22.1 Use Of RTA's Names In Advertising Or Public Relations**

RTA reserves the right to review and approve RTA related copy prior to publication. The Contractor agrees not to allow RTA-related copy to be published in Contractor's advertisements or public relations programs unless such copy has been submitted and received prior written approval from RTA. Such approval shall not be unreasonably withheld. The Contractor agrees that published information on RTA or RTA programs shall be factual and in no way imply that RTA endorse the Contractor's firm, service, or product.

The Contractor shall include, or have included, the requirements of this article in all subcontracts of any tier.

### **1.22.2 Prior Approval of Publications and Interviews**

The Contractor, its employees and subcontractor personnel shall not grant press interviews or otherwise discuss with the press activities related to the Contract without prior written approval of the Technical Project Manager and Contracting Officer. In the event the Contractor directly receives a press inquiry, the Contractor shall respond by directing the press representative to the Technical Project Manager for response.

Publication, speaking engagements or other presentations by the Contractor, subcontractors, or their personnel regarding the services performed in association with this Contract shall require prior written approval from the Technical Project Manager and Contracting Officer.

### **1.22.3 Publicity and Advertising**

The Contractor shall not make any announcement, release any photograph, or release any information concerning this Contract (including promotional materials) or the project or any part thereof, to any member of the public, press, business entity, or any official

body unless prior written consent is obtained from the Technical Project Manager and Contracting Officer.

#### **1.22.4 Restriction on Endorsements**

The Contractor shall not refer to contracts awarded by RTA in commercial advertising, in a manner which states or implies that the product or service provided is approved or endorsed by RTA or the federal government, or is considered by RTA or the federal government to be superior to other products or services. The Contractor may request a determination as to the propriety of promotional materials from the Contracting Officer.

#### **1.22.5 Rights to the Use of the Name "Music City Star"**

See paragraph X, Rights to the Use of the Name "Music City Star", Part I: General Provisions of the RFP.

Deleted: Part II

### **1.23 SUCCESSFUL TERMINATION OF CONTRACTOR'S RESPONSIBILITY**

A Contract will be considered as successfully fulfilled when the work has been completed in accordance with the terms of the Contract; when final acceptance has occurred (if applicable); when final payment has been authorized; when all of the obligations of the Contractor and his surety (if applicable) have been compiled with; and when final payment has been made.

### **1.24 ADDITIONAL FEDERAL TRANSIT ADMINISTRATIONB CLAUSES**

#### **1.24.1 Transit Employee Protective Agreements**

49 U.S.C. § 5310, § 5311, and § 5333  
29 CFR Part 215

##### **Applicability to Contracts**

The Transit Employee Protective Provisions apply to each contract for transit operations performed by employees of a Contractor recognized by FTA to be a transit operator. (Because transit operations involve many activities apart from directly driving or operating transit vehicles, FTA determines which activities constitute transit "operations" for purposes of this clause.)

##### **Flow Down**

These provisions are applicable to all contracts and subcontracts at every tier.

(2) The Contractor also agrees to include the any applicable requirements in each subcontract involving transit operations financed in whole or in part with Federal assistance provided by FTA.

#### **1.24.2 Control of Alcohol and Drug Use FRA**

49 CFR Part 219

#### Applicability to Contracts

The Drug and Alcohol testing provisions apply to Operational Service Contracts.

#### Flow Down Requirements

Anyone who performs a safety-sensitive function for the recipient or subrecipient is required to comply with 49 CFR 219, with certain exceptions for contracts involving maintenance services. Maintenance contractors for non-urbanized area formula program grantees are not subject to the rules. Also, the rules do not apply to maintenance subcontractors.

#### Drug and Alcohol Testing

The contractor agrees to establish and implement a drug and alcohol testing program that complies with 49 CFR Parts 219, produce any documentation necessary to establish its compliance with Parts 219, and permit any authorized representative of the United States Department of Transportation or its operating administrations, the State Oversight Agency of California, or RTA, to inspect the facilities and records associated with the implementation of the drug and alcohol testing program as required under 49 CFR Parts 219 and review the testing process. The contractor agrees further to certify annually its compliance with Parts 219 before June 30 and to submit the Management Information System (MIS) reports before January 15 to RTA. To certify compliance the contractor shall use the "Substance Abuse Certifications" in the "Annual List of Certifications and Assurances for Federal Transit Administration Grants and Cooperative Agreements," which is published annually in the Federal Register.

#### **1.24.3 ADDITIONAL FRA REGULATIONS**

Contractor must comply with all parts of 49 CFR 200 thru 49 CFR 300 that is applicable to this contract.

# **APPENDIX A - APPROVED EXCEPTIONS TO REQUEST FOR PROPOSALS 2004-01**

Change #	Description	Location in Documents	Original Language	Revised Language
1	One additional reverse commuter trip	Appendix C – Current Schedule and Equipment Availability	Remains the same	TSG agrees to provide one additional reverse commute trip between Nashville and Lebanon within the established base service fixed price.
2	Handling of ticket vending machines	Addendum #1 - 10/14/04 – Scope of Services	"Add new section in Scope of Services: Page III-35 section B.12.h. " Servicing of Ticket Vending Machines (TVM)". The Contractor shall recover money, account of such monies, reconcile money with ticket stock dispersed, make deposits of monies received, replenish ticket stock as provided, and make accounting to the RTA for all such funds received. The TVM's must be so serviced at least twice per week (Tuesday and Friday after commute period) unless the RTA otherwise agrees to another schedule proposed by the contractor after three months of service. Such service must be bonded to an amount of not less than \$20,000. The TVM's will be cash only, pre-printed roll ticket stock, no cash back (exact fare in multiples of \$5) up to \$20 purchase. The TVM's are former BART "Add a Fare" machines modified as above for exact fare cash only transactions."	Revenue collection from the ticket vending machines and maintenance of the ticket vending machines is dropped from the scope of services and will be undertaken by the Nashville Metropolitan Transit Authority.
4	Reduction in trackage fees (trackage agreement dated May 7, 2005)	Section III – Scope of Services, A.2.e – Right of Way	Remains the same	NERC will reduce the trackage fee for the one additional reverse commute trip from \$4.00 per track mile to \$2.00 per track mile.
5	Revised Best and Final Offer (BAFO)	Section IV – Qualifications, Requirements and Evaluation Criteria, F.7 Cost Submittal Form	Original BAFO from TSG dated January 18, 2005	Revised BAFO from TSG dated March 25, 2005
6	Revised Fleet Configuration	Section III, Scope of Services, Para. A.3 - Rolling Stock Availability and Para. A.6.c.4 - Long-Term Holds	Remains the Same or as altered by the addenda	<p>The RTA fleet of active cars for purposes of these sections consist of:</p> <p>3 Cab Cars – Fully Operational,</p> <p>4 Trailer Cars – Fully Operational</p> <p>The remaining four cars will not be placed in service.</p>

				Two trailer cars will be dismantled for parts and two cars (one Cab Car and one Trailer Car) will be held in reserve, without alteration or upgrades
7	Additional locomotive	Section III – Scope of Services		Third locomotive to be acquired in April 2005.
8	Memorandum with revised BAFO 3-25-05			Additional detail on scope

## APPENDIX B - CERTIFICATE OF CURRENT COST OR PRICING DATA

This is to certify that, to the best of my knowledge and belief, the cost or pricing data submitted, either actually or by specific identification in writing, to RTA in support of RFP No. 2004-01 are accurate, complete, and current as of \_\_\_\_\_.\*. This certification includes the cost or pricing data supporting any advance agreements and forward pricing rate agreements between the Proposer and RTA that are part of the proposal.

Firm: \_\_\_\_\_

Signature: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date of execution\*\*: \_\_\_\_\_

\* Insert the day, month, and year when price negotiations were concluded and price agreement was reached or, if applicable, an earlier date agreed upon between the parties that are as close as practicable to the date of agreement on price.

\*\* Insert the day, month, and year of signing, which should be as close as practicable to the date when the price negotiations were concluded and the contract price was agreed to.

**APPENDIX C – ACKNOWLEDGMENT OF ADDENDA**

**ACKNOWLEDGMENT OF ADDENDA**

The undersigned acknowledges receipt of the following addenda to the bid documents:

ADDENDUM NUMBER: \_\_\_\_\_ DATED: \_\_\_\_\_

ADDENDUM NUMBER: \_\_\_\_\_ DATED: \_\_\_\_\_

ADDENDUM NUMBER: \_\_\_\_\_ DATED: \_\_\_\_\_

ADDENDUM NUMBER: \_\_\_\_\_ DATED: \_\_\_\_\_

**NOTE:** Failure to acknowledge receipt of all addenda may cause the bid to be considered non-responsive to the solicitation. Acknowledged receipt of each addendum must be clearly established and included with the bid.

\_\_\_\_\_  
Name of Individual, Partner, Joint Venture, Corporation

\_\_\_\_\_  
Street Address

\_\_\_\_\_  
City, State, Zip Code

\_\_\_\_\_  
Telephone Number and Contact Person Regarding Bids

\_\_\_\_\_  
Authorized Signature and also Name Printed

\_\_\_\_\_  
Title